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## “HISTORICAL SITUATIONS” IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN STRASBOURG

### Abstract

*This Article investigates how the European Court of Human Rights becomes competent to make decisions in cases concerning (or taking roots in) “historical situations” preceding the ratification of the European Convention by a given Member State or even the enactment of the Convention. “Historical situations” refer to events that occurred in the period of Second World War or shortly thereafter. In all such cases, the preliminary question arises whether the Court is competent temporally (ratione temporis) to deal with the application. This group of cases concerned usually allegations touching upon the right to life and the right to property. The Court had to decide if the allegation in question related to a temporally closed event (making the Court not competent) or rather to a continuous violation (where the Court could adjudicate). A specific set of legal questions arose vis-à-vis the right to life, first of all that of the autonomy of the procedural obligation to conduct an efficient investigation. The Strasbourg case law did not provide a clear answer. However, following two crucial judgements rendered by the Grand Chamber, the Court has established an interesting legal framework. Article analyses also two other situations having a historical dimension: bringing to justice those accused of war crimes or other crimes under international law (in light of the alleged conflict with the principle of nullum crimes sine lege) and pursuing authors of pro-Nazi statements or speech denying the reality of Nazi atrocities.*

Complaints concerning situations which took place before a given country ratified the European Convention on Human Rights (hereinafter referred to as the “Convention”) have found their way, and continue to find their way, onto the

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docket of both the European Court of Human Rights in Strasbourg (hereinafter interchangeably the “Court” or “ECHR”) as well as the earlier European Commission on Human Rights (hereinafter usually “Commission”).<sup>1</sup> In such cases, one of the preliminary questions which arises concerns the *ratione temporis* competence of the Court/Commission. Both the Court and Commission have attempted to delineate the criteria upon which they decide whether a given complaint (also sometimes referred to as an application) is timely and justiciable, or barred as untimely.

Questions and issues related to the timeliness of complaints will be examined in the first part of this work. These questions usually arise in connection with violations of the right to life (Article 2) or the right to property (Article 1, Protocol no. 1). It has sometimes happened that complainants have accused the State (in its own right or through individuals or agencies acting on its behalf) of being directly liable for taking of life or property in violation of the provisions of the Convention. However, more often the State, as a Party to the Convention, is accused of failure to react appropriately to a death or homicide or illegal deprivation of property via its alleged failure to conduct an effective investigation or prosecution, failure to apprehend those responsible, or failure to provide appropriate legal remedies. In order for the Court or Commission to review accusations against a State arising out of events which took place before the Convention entered into force on the territory of said State, it had to establish a set of criteria which would justify its jurisdiction over cases arising from so-called “historical situations”, understood, for the purposes of this work, as situations arising out of events during the World War II and the years immediately following its end.

In addition to the issues of timeliness, which are dealt with in this work, two other legal issues are examined. The first concerns the efforts made, by States party to the Convention, to apprehend and hold accountable the perpetrators of “historical crimes”. In those complaints lodged in the Court or Commission by complainants found guilty in national courts, their first line of defence is always that there is no legal basis for prosecuting them for their acts. Such prosecutions were, in the arguments of such complainants, a violation of the principle *nullum crimen sine lege, nulla poena sine lege*, and hence a violation of Article 7 of the Convention. A second problem relates to the approach of the Commission and the Tribunal to the validity and proportionality of domestic sanctions

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<sup>1</sup> Prior to the entry into force of Protocol no. 11 (1 November 1998), which reformed the Strasbourg application procedures, the Commission preliminarily handled all complaints and issued an admissibility decision (*décision sur la recevabilité*) regarding each complaint. (In fact the Commission continued to act for another year after the Protocol no. 11 came into effect, finishing the work it had started).

imposed for violating laws prohibiting the public denial of certain historical facts. One may argue in such cases a violation of freedom of expression protected by Article 10 of the Convention. In the latter instances, the cases before the Court or Commission usually concern the verdicts of national courts (more rarely, other national institutions) for making pro-Nazi statements or negating the existence of certain war crimes, the Holocaust, or the existence of concentration camps and/or gas chambers.

I. So far, no cases have been placed on the Strasbourg docket concerning acts committed by a State during World War II which could be qualified as violations of Article 2 of the Convention.<sup>2</sup> There would appear to be four principal reasons for this. Firstly, the Convention was created (signed on 4 November 1950) and came into effect (on 3 September 1953), after World War II. This means that the Convention could not be, *prima facie*, applied, in accordance with the norm of international law prohibiting the retroactive application of laws.<sup>3</sup> Secondly, acts committed during the World War II, which constituted violations of the right to life, were actively pursued and prosecuted, and those found responsible were tried and punished, often quite severely. Thirdly, during the first two decades after the Convention entered into force, its regime was *in statu nascendi*. In reality, the so-called “formative period” associated with the creation of the fundamental doctrines of the Convention and their application, which was closely intertwined with the emerging jurisprudence of the Commission and the Court, only occurred during the 1970s, and in some cases only in the 1980s.<sup>4</sup> In addition, the control mechanisms aimed to ensure observance of the Convention were different at that time than they are today. A uniform system of control, equally applicable to State-Parties to the Convention and based on permanent, year-round Court oversight and sessions, only came into being with the entry into force of Protocol no. 11 on 1 November 1998.<sup>5</sup>

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<sup>2</sup> Allegations of crimes against humanity, even genocide, have been episodically alleged in order to provide the Court with *ratione temporis* competence in cases primarily concerning the deprivation of property rights of displaced or resettled Germans (often referred to by the Germans as expulsion): *Bergauer and 89 others v. Czech Republic* (application no. 17120/04, decision of 13 December 2005, unpublished) and *Preussische Treuhand GmbH and Co. KG A.A. v. Poland* (application no. 47550/06, decision of 7 October 2008).

<sup>3</sup> See Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969.

<sup>4</sup> See, for example H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Martinus Nijhoff Publisher, Dordrecht: 1996, Chs. 1 and 2.

<sup>5</sup> For more on the topic of the control mechanisms introduced by Protocol no. 11, see B. Gronowska, *Reforma procedury kontrolnej Europejskiej Konwencji Praw Człowieka z 1950 r. – wybrane zagadnienia* [Reforming the control procedures of the European Convention

Finally, recognition of the particular responsibilities arising from Article 2 of the Convention, and in particular – what is important when determining the *ratione temporis* competence of the Court and the Commission – the procedural obligations upon State-Parties arising therefrom, only appeared in the Court's decisions in the 1990s.

In the Court's most recent decisions, the question has arisen several times whether the principle of *ratione temporis* is applicable to situations whereby a State is accused of taking life or causing death by actions which took place before such a State became a Party to the Convention. In contrast to decisions involving allegations of the illegal deprivation of property, the Court's verdicts regarding deprivation of life have not formulated with any precision the Convention principles to be applied, which has led to significant contradictions and discrepancies in its jurisprudence.

The issues of timeliness have arisen, for all practical purposes, in relation to the new Member States of the Council of Europe, i.e. those which joined the Council and ratified the Convention after 1990, and have concerned relatively recent acts which, however, took place prior to the time an accused State ratified the Convention. At the time these cases arose, the Strasbourg jurisprudence (used hereinafter to refer to the combined decisions of both the Commission and Court) already had established the difference between the substantive and procedural aspects of Article 2, upon which the complainants relied.

The substantive aspect of Article 2 is the effective protection of human life. Above all, this prohibits States (or their organs or persons acting on the State's behalf) to take human life, with the exception of specific circumstances which are enumerated in a closed fashion in Paragraph 2 of Article 2 (in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection).<sup>6</sup> This aspect of Article 2 is thus directly connected to an act of killing or causing death.

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of Human Rights of 1950 – selected issues], *Przegląd Prawa Europejskiego* 1996, no. 1; A. Drzemczewski, *The European Human Rights Convention: a New Court of Human Rights as of November 1, 1998*, 55(3) *Washington and Lee Law Review* 697 (1998); H.G. Schermers, *The Eleventh Protocol to the European Convention on Human Rights*, 19 *European Law Review* 367 (1994).

<sup>6</sup> These “permissible circumstances” are subject to strict interpretation, and any allegation of such circumstances and the consequences thereof are subject to rigorous verification by the Court (e.g. *Avşar v. Turkey*, application no. 25657/94, judgement of 10 July 2001, ECHR 2001-VII, para. 391).

There is no doubt that an act of killing or causing death needs to be treated as a single, instantaneous act (*acte instantané*), not as an act which creates a situation of a continuing violation (*une situation de violation continue*). As a result the Court is without competence to issue a judgement based on the substantive aspect of Article 2 if a death took place before a State-Party ratified the Convention.<sup>7</sup>

In addition to the substantive aspect of Article 2, the Court has also identified its procedural aspect. The Article 2 providing that “(e)veryone’s right to life shall be protected by law” – when read in conjunction with Article 1 that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” – requires the State to undertake “some form of effective official investigation” when individuals were intentionally killed or when the circumstances of a death (and the responsibility for this death) are unclear.<sup>8</sup> A State-Party’s obligation to comply with procedural prescriptions have been analysed by the Court separately from its obligation not to violate substantive principles. This can lead to a situation whereby a State is deemed to have violated the procedural obligations of Article 2, without however violating its substantive principles.<sup>9</sup> This separate treatment of these two aspects of Article 2 is justified. Very often a State may not be ascribed with guilt for

<sup>7</sup> See e.g., *Varnava and others v. Turkey*, applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, judgement of 10 January 2008, para. 109; *Ivanova v. Russia*, application no. 74705/01, decision of 1 April 2004 (unpubl.); *Bilgin v. Turkey*, application no. 26147/95, decision of 4 September 1996 (unpubl.); *Jackiewicz v. Poland*, application no. 23980/94, decision of 18 October 1995 (unpubl.); *Walewska v. Poland*, application no. 36424/97, decision of 9 September 1998 (unpubl.).

<sup>8</sup> E.g., *McCann and others v. United Kingdom*, application no. 18984/91, judgement of 27 September 1995 (Grand Chamber), Series A.324, para. 161; *Ergi v. Turkey*, application no. 23818/94, judgement of 28 July 1998, RJD 1998-IV, para. 82; *Mastromatteo v. Italy*, application no. 37703/97, judgement of 24 October 2002 (Grand Chamber), ECHR 2002-VIII, para. 89; *Assenov and others v. Bulgaria*, application no. 24760/94, judgement of 28 October 1998, RJD 1998-VIII, paras. 101-106.

<sup>9</sup> E.g., *Kaya v. Turkey*, application no. 22729/93, judgement of 19 February 1998, RJD 1998-I, paras. 74-78 and 86-92; *McKerr v. United Kingdom*, application no. 28883/95, judgement of 4 May 2001, ECHR 2001-III, paras. 116-61; *Scavuzzo-Hager and others v. Switzerland*, application no. 41773/98, judgement of 7 February 2006 (unpubl.), paras. 53-69 and 80-86; *Ramsahai and others v. Holland*, application no. 52391/99, judgement of 15 May 2007 (Grand Chamber), paras. 286-89 and 323-57. The autonomy of the procedural issues makes it possible to allege solely a lack of effective investigation. So it was in, among others, *Calvelli and Ciglio*, application no. 32967/96, judgement of 17 January 2002 (Grand Chamber), ECHR 2002-I, paras. 41-57; *Byrzykowski v. Poland*, application no. 11562/05, judgement of 27 June 2006 (unpubl.), paras. 86 and 94-118; *Brecknell v. United Kingdom*, application no. 32457/04, judgement of 27 November 2007 (unpubl.), para. 53.

an individual death, but its failure to provide appropriate measures or procedures (or to initiate them if provided for) aimed at investigating the causes of and circumstances surrounding a death may justify finding a violation by said State of Article 2 of the Convention.

The question arises, within what time frame relative to the entry into force of the Convention in the territory of a State-Party, must the procedural obligations be put into force? Two model solutions can be identified. In the first, the procedural and substantive aspects of Article 2 are both treated the same. In other words, if a death occurred prior to the entry into force of the Convention, no procedural obligations concerning the death can be imposed on a State not yet party to the Convention, since to do so would have the same effect as making the State responsible for the death, an outcome which would lie outside the Court's *ratione temporis* competence with regard to the provisions of Article 2 in their entirety. The second possible model would separate the procedural and substantive aspects of Article 2. Although the Court would not be competent to adjudicate on whether the deprivation of life violated Article 2 in its substantive aspect with regard to deaths occurring before the Convention was in force, it would however be able to assess whether a State-Party fulfilled its autonomous procedural obligations with regard to the death after the State became a party to the Convention. In such a case it would be necessary to delineate the criteria to be applied in determining the existence of procedural obligation.

II. In its first decision regarding the two aspects of Article 2, the Court chose the first solution, i.e. linking the two aspects with regard to the question of timeliness. This occurred in the combined case of *Moldovan* and others as well as *Rostas and others v. Romania*.<sup>10</sup> These proceedings concerned a pogrom which took place on 20 September 1993, and which resulted in the deaths of three Roma and acts of arson against the houses of a large number of Roma. The events occurred before the Convention went into effect in Romania (20 June 1994). The Court, commenting on the admissibility of the allegations of violation of Article 2, issued a short opinion stating that, in accordance with recognised principles of international law, the Convention could only be applied to facts and events which took place after its entry into force on the territory of a Party-State. Inasmuch as the State's responsibility to undertake an effective investigation of any alleged violation and to provide effective sanctions against the perpetrators of such violations is inextricably bound up with the events themselves – events which fall

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<sup>10</sup> Application nos 41138/98 and 64321/01, decided (partially) on 13 March 2001 (unpubl.).



outside the Court’s *ratione temporis* competence – then the judges of the Court are similarly without competence to examine allegations of procedural violations of Article 2 arising from such events.<sup>11</sup>

The formalistic approach laid down in the Rostaş case appeared to be softened somewhat by *dicta* contained in the Court’s subsequent decision in *Voroshilov v. Russia*.<sup>12</sup> That case concerned the alleged violation of Article 3 of the Convention, which prohibits “torture or inhuman or degrading treatment or punishment.” Once again, the “substantive act” occurred prior to the entry into force in Russia of the Convention, and the complainant alleged the lack of subsequent effective proceedings aimed at identifying and punishing the perpetrators (alleged to be policemen). In describing its lack of *ratione temporis* competence, the Court stated that it could not verify whether the complainant made “credible assertions” concerning his injuries, the circumstances surrounding them, and the perpetrators. Initially, Russian policemen were charged with criminal offenses, but the Russian courts determined that Voroshilov might have incurred his injuries not during his questioning, but in his jail cell. The ECHR’s formulation seemed to suggest that if Voroshilov’s alleged facts had been verified, and if he could have demonstrated that the Russian authorities did not make efforts to apprehend and punish the perpetrators, then the Court might have determined it was competent to hear the case. In other words, competent national institutions (courts) would have not applied national law to established facts.<sup>13</sup>

However, cases based on a lack of effort to apprehend and punish perpetrators seem to require proof of the identity of the perpetrators and knowledge of the surrounding circumstances, which in practice is usually quite unlikely. Even in cases of politicized and corrupt legal regimes, it is far more likely that certain

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<sup>11</sup> The Court did however agree to review allegations concerning events which took place following the entry into force of the Convention (final decision of 3 March 2003 (unpubl.)), indicating the following violations of Convention provisions: Article 3 (the provision concerning “degrading treatment”); Article 6 (Right to a fair trial); Article 8 (Right to respect for private and family life) and Article 14 (Prohibition of discrimination). In its judgement the Court found that these provisions were violated and granted the seven complainants EUR 238,000 in material damages (judgement of 12 July 2005, ECHR 2005–VII). A group of 18 other complainants reached an agreement with the Romanian authorities (which agreed to pay 262,000 Euro in damages), which agreement was confirmed by Court judgement (from 5 July 2005, (unpubl.)).

<sup>12</sup> Application no. 21501/02, decision of 8 December 2005 (unpubl.).

<sup>13</sup> It would appear that an analogical reasoning to the Voroshilov case, and use of the same formulation (credible assertions) was used by judges Nicolas Bratza i Rıza Türmen in their separate opinion (pt. 6) attached to the judgement in *Šilih v. Slovenia* (Grand Chamber), which is further discussed in detail in this article.

versions of events will be simply questioned, rather than accepted, but without drawing proper legal consequences. Nonetheless the casus of Voroshilov (in the sense of either made or possible distinctions) could be applied to “historical situations” where the circumstances surrounding a particular crime and the identity of the perpetrators is established, but the national court, rather than classifying such a crime as an international law crime, treated it as an “ordinary” criminal offense.<sup>14</sup>

The argumentation which the Court outlined in the *Moldovan* and *Voroshilov* cases was repeated in its *Kholodov v. Russia* decision, which concerned the much-publicised murder of a well-known journalist of the “Moscow Komsomolec”.<sup>15</sup>

The Court’s approach in the above-mentioned cases, and its finding that it lacked *ratione temporis* competence, seemed to be confirmed by the 8 March 2006 verdict of the Grand Chamber in the case of *Blečić v. Croatia*, which concerned the loss of property rights in the form a particular lease of premises (which the complainants argued was a violation of Article 8 of the Convention and Article 1 of Protocol no. 1.)<sup>16</sup> Although the decisive element of this case was whether the alleged violation by the State occurred before or after the entry into force of the Convention for Croatia (the decision which the complainants alleged violated their rights was handed down by the Supreme Court, confirming a lower court decision, on 15 February 1996; while the decision of the Constitutional Court was handed down on 8 November 1999, after the entry into force of the Convention for Croatia on 5 November 1997),<sup>17</sup> the ECHR verdict also contained some general observations concerning the Court’s *ratione temporis* competence.

The Strasbourg judges stated that the *ratione temporis* competence of the Court needs to be established taking into account the “facts constitutive of the

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<sup>14</sup> Although the Strasbourg jurisprudence declares that national courts (institutions) are entitled to legally classify the facts before the court, the ECHR may question the classification in the event it is clearly mistaken or arbitrary.

<sup>15</sup> Application no. 30651/05, decision of 14 September 2006 (unpubl.). The journalist, who wrote about corruption in the Russian army, died as the result of a package bomb. Five officers were accused of murder, but acquitted in the later criminal trial.

<sup>16</sup> Application no. 59532/00, judgement of 8 March 2006, ECHR 2006-III.

<sup>17</sup> The Court had to decide which court decision marked the exhaustion of national remedies – the judgement of the Supreme Court (handed down before the entry into force of the Convention), or the decision of the Constitutional Court (after the critical date upon which the Convention entered into force). In its judgement the Court (by majority of 11 votes to 6) chose the former variant, which deprived the Court of *ratione temporis* competence. The separate concurring opinion confirmed the single issue upon which the majority of the judges agreed, i.e. that the decision of the Supreme Court constituted *res iudicata*. If that decision had occurred after 5 November 1997, the Court would have had temporal competence.



alleged interference”. It added that a lack of reaction on the part of a State to the alleged interference (“the subsequent failure of remedies aimed at redressing th[e] interference”) could not be used to justify a finding of the Court’s *ratione temporis* competence (para. 77). It stated that the Convention contains no specific obligation to legally redress violations of the Convention which occurred in a particular State prior to the entry into force of the Convention (para. 81).<sup>18</sup> To take the opposite stance would constitute a retroactive application of an international agreement, in violation of the generally-recognised norms of international law, as well as calling into question the fundamental distinction between a violation and reparations that underlies the law of State responsibility.

The Convention could however be applied in cases of permanent and continuing violations. But “temporally closed” situations remain beyond the jurisdiction of the Court. In the *Blečić* judgement, the judges seemed to qualify a State’s procedural obligation arising from Article 2 of the Convention as a legal reaction to a temporally closed event. In reconstruing its earlier decisions regarding the borderlines of its *ratione temporis* competence, it recalled number of key cases which laid down principles preventing the consideration of certain complaints, and this included *Moldovan* and *Rostaş* judgements (par. 75). “Constitutive facts” for the purposes of Article 2 of the Convention, both in its substantive aspect and procedural aspect, are the death and date of death.<sup>19</sup>

III. The Strasbourg jurisprudence concerning the applicability of the procedural aspects of Articles 2 and 3 to events which took place prior to the Convention’s entry into force in a given State’s territory has not been uniform. In the decision of *Bălăşoiu v. Romania*,<sup>20</sup> handed down two years after the *Moldovan* and *Rostaş* decisions, the Court accepted the admissibility of complaints based on the lack of effective official investigation into events alleged to be in violation of Article 3 of the Convention, even when such events took place prior to the entry into force

<sup>18</sup> See also, *Kopecký v. Slovakia*, application no. 44912/98, judgement of 28 September 2004 (Grand Chamber), ECHR 2004-IX, para. 38.

<sup>19</sup> The criteria of “constitutive or key facts” allow the Court, when deciding upon temporal jurisdiction, to consider the specificity of the Convention provisions alleged to have been violated and the factual contour of the alleged violation, which in turn allows it to conduct an individual case-by-case analysis. See *Stamoulakatos v. Greece (no. 1)*, application no. 12806/87, judgement of 26 October 1993, Series A. 271; *Kadiķis v. Latvia*, application no. 47634/99, judgement of 29 June 2000; *Litovchenko v. Russia*, application no. 69580/01, decision of 18 April 2002; *Kikots and Kikota v. Latvia*, application no. 54715/00, judgement of 6 June 2002; *Veeber v. Estonia (no. 1)*, application no. 37571/97, decision of 7 November 2002; and *Zana v. Turkey*, judgement of 25 November 1997, RJD 1997-VII.

<sup>20</sup> Application no. 37424/97, decision of 20 April 2004 (unpubl.).

of the Convention in respect of Romania. Furthermore, the *Rostaş* and *Bălăşoiu* decisions concerned complaints against the same State, and the contradictory opinions were handed down (unanimously) by the same Court, although the make-up of the Court was different.<sup>21</sup> The diametrically-opposed conclusion in the *Bălăşoiu* case – especially in light of the fact that the Romanian authorities argued strenuously that the earlier *Moldovan* case required rejection of the complaint for the very same reasons given therein – would seem to be clear evidence of an intent on the part of the Strasbourg judges (or at least some of them) to consciously reject some of the earlier-established principles concerning the timeliness of complaints.

As in the *Bălăşoiu* case, in 2007 the Court, in the case of *Šilih v. Slovenia*, unanimously decided to review a complaint, which it confirmed on the merits, arguing that Slovenia violated its procedural obligations arising from Article 2 of the Convention.<sup>22</sup> While the judges admitted that the Court had issued previous divergent opinions, it refused to call the decisions contradictory.<sup>23</sup> However, in indicating the criteria upon which it would rely in deciding the timeliness of *Šilih*'s complaint, the judges cited that portion of the *Blečić* decision where the judges declared that, in deciding the issue of timeliness, it was necessary to take into account “the facts of which the applicant complains and the scope of the Convention right alleged to have been violated”.<sup>24</sup> Moreover, the Court found that, in the case before it, Slovenia's procedural obligation under Article 2 to create an effective judicial mechanism for determining the cause of death was applicable, since even though the death occurred prior to the entry into force of the Convention for Slovenia, the court procedures regarding the death took place afterwards (paras. 94–97). It should be noted that the cases of *Moldovan*, *Voroshilov* and *Kholodov* also involved investigative or court procedures which took place after the entry into force of the Convention, and the procedures involved in the Slovenia case do not appear to offer anything new which would distinguish them from procedures not reviewed in the previous cases before the Court.<sup>25</sup>

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<sup>21</sup> The composition of the Court in the *Moldovan* and *Bălăşoiu* cases included only two judges in common.

<sup>22</sup> Application no. 71463/01, judgement of 28 June 2007.

<sup>23</sup> Such declarations are usually reserved for the Grand Chamber, which may accept a case when there are earlier contradictory or hard-to-reconcile opinions, for the primary purpose of clarifying the Court's reasoning in order to offer guidance for future cases.

<sup>24</sup> Para. 92 of the *Šilih* judgement, in reliance on para. 82 of the *Blečić* judgement.

<sup>25</sup> One cannot consider as *novum* the circumstance that in the *Šilih* case the court procedures were commenced after the entry into force of the Convention in Slovenia, while in the earlier cases the investigative procedures were commenced before the entry into force of the Convention (with later procedures taking place after the critical date).

The principles and reasoning set forth in the *Bălăşoiu* and *Šilih* cases were repeated by the Court in the case of *Teren Aksakal v. Turkey*,<sup>26</sup> where the Court determined it had competence to review the allegations of procedural violations of Articles 2 and 3 of the Convention in connection with the death of a prisoner that occurred 12 November 1980. The death happened prior to Turkey’s acceptance of the legal right of individuals under the Convention to file individual complaints to the Commission and the Court (what in effect makes the situation analogous to the one which occurred prior the Convention’s entry into force). The Court next found, by a vote of 5-2, that Turkey violated its procedural obligations under both Articles. The two dissenting judges, (Turkish judge Rıza Türmen and Monaco judge Antonella Mularoni) wrote a joint dissenting opinion, pointing out the increasing inconsistency in the Strasbourg jurisprudence and calling for the intervention of the Grand Chamber to resolve the inconsistencies.<sup>27</sup>

The postulates in the dissenting opinion of judges Türmen and Mularoni envisioned a scenario whereby the Turkish government would, in the *Teren Aksakal* case, file a request for referral to the Grand Chamber requesting clarification of the two conflicting interpretations, and in effect directing the jurisprudence of the Strasbourg Court. Even though Turkey filed such a request, in the interim the Grand Chamber issued its judgement in the case of *Šilih v. Slovenia*<sup>28</sup> on 9 April 2009, which is examined in detail in the next section of this article.

Prior to the Grand Chamber’s decision in *Šilih*, the governing standards for determining timeliness seemed to be those contained in the *Moldovan*, *Voroshilov*, and *Kholodov* decisions. They were also reflected in the underlying thesis of the Grand Chamber’s judgement in the *Blečić* case, which made the *Bălăşoiu*, *Šilih* and *Teren Aksakal* all the more unexpected and explosive, and subjected them to accusations of being “suspicious and minority views”. However, the “overruling” of previous Strasbourg jurisprudence (or even treating it as “divergent” pending resolution via a judgement by the Grand Chamber) was not the only juridical option open to the Court. It could also have relied upon the judicial mechanism

<sup>26</sup> Application no. 51967/99, judgement of 11 September 2007.

<sup>27</sup> In addition to the cases of *Bălăşoiu*, *Šilih* i *Teren Aksakal*, the Court on two other occasions communicated the respondent States applications related to their procedural obligations arising from Article 2, while accepting at the same that it had no *ratione temporis* competence with respect to the substantive aspects of the case. These cases were *Şandru v. Romania* (application no. 22465/03, decision of 6 April 2006, (unpubl.)) and *Tuna and Tuna v. Turkey* (application no. 22339/03, decision of 2 October 2007 (unpubl.)). See also *Andrita v. Romania* (application no. 67708/01, decision of 27 January 2009 (unpubl.)).

<sup>28</sup> Chronologically speaking, the first “dissident” case of *Bălăşoiu* ended in friendly settlement, which the Court accepted, ending the case (judgement of 20 April 2004).

of “distinction”, borrowed from the common law tradition and previously made use of by the Court.

The Court used the technique of distinction in the case of *Varnava and Others v. Turkey*, concerning the unknown fate of nine Cyprus Greeks who “disappeared” during the Turkish invasion of Cyprus in 1974.<sup>29</sup> The complaints were filed in the name of the missing as well as on behalf of their next-of-kin (wives, parents and children). Before the Court could undertake an assessment of the allegations contained in the complaints, it had to decide whether it had *ratione temporis* jurisdiction over them. Even though the Convention had been in force in Turkey since 18 May 1954, the Turkish authorities did not recognise the right to file individual complaints to the Commission until 28 January 1987, and only recognised the right to file individual complaints to the Court on 22 January 1990.

The Court ruled that, contrary to the case of “confirmed deaths”, which are temporally closed and cannot be reviewed by the Court if they took place prior to the entry into force of the Convention for a given State (or, in the case of Turkey, right to file individual complaints), cases of “missing persons” present a permanent, continuing situation which allows the Court to take temporal cognisance thereof (para. 110). While the Court acknowledged that such competence could naturally only apply to the activities and/or omissions of the State authorities after the entry into effect of the Convention (or, in the case of Turkey, the right to file individual complaints), it found that it was authorised to take into account facts which took place prior to such date.<sup>30</sup> In applying the provisions of Article 2 to the case of missing persons, it was sufficient to find that the disappearance took place in life-threatening circumstances. In addition, the Court stated that when the existence of life-threatening circumstances are related to war activities, then contrary to the situation of “non-war disappearances”, it was only necessary for the complainants to present “minimal information” that the surrounding circumstances were life-threatening (para. 130).<sup>31</sup>

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<sup>29</sup> Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, judgement of 10 January 2008.

<sup>30</sup> Similarly, see *Hokkanen v. Finland*, application no. 19823/92, judgement of 23 September 1994, Series A. 299-A, para. 53; *Broniowski v. Poland*, application no. 31443/96, decision of 19 December 2002 (Grand Chamber), para. 74.

<sup>31</sup> With regard to “non-war disappearances” the Court requires the complainant to prove that the person who disappeared was at the time “in some way in custody of someone acting on behalf of the State”. This standard was elaborated in the “disappearances” in north-eastern Turkey and Chechnya. See e.g., *Kurt v. Turkey*, application no. 24276/94, judgement of 25 May 1998, RJD 1998-III, para. 99; *Akdeniz and others v. Turkey*, application

Having determined it had *ratione temporis* competence, the Court held there was a violation of the procedural obligations inherent in Article 2. The judges did not present any especially detailed analysis of this issue, relying on the Court’s earlier verdict in the case of *Cyprus v. Turkey* which concerned, inter alia, the fate of 1485 Cyprus Greeks “missing” during the 1974 war.<sup>32</sup> The Court’s finding that it had *ratione temporis* competence was by 6 votes to 1. The only dissenting opinion was that of Turkish judge Gönül Başaran Erönen (who sat on the bench in the case as an *ad hoc* judge). Judge Erönen argued that a missing person(s) case of such length as the one before the Court should be treated as one of presumed death. He further argued that there was no legal basis for treating a presumed death differently than an actual death, and if the matter before the Court had concerned actual death in the same circumstances, the Court would not have had *ratione temporis* competence.

The *Varnava* case once again came before the Court after the Turkish request for review by the Grand Chamber was accepted by a panel of five judges.<sup>33</sup> The Court once again found that it had *ratione temporis* competence, sharing the opinion of the Chamber (paras. 130-150), and went on to find that Turkey violated its obligations under Article 2. This verdict was reached by a vote of 16 to 1, the alone dissenting vote being that of the Turkish judge.

IV. As was mentioned earlier, the discrepancies and divergences in the Strasbourg jurisprudence regarding *ratione temporis* competence with regard to the procedural obligations of States under Articles 2 and 3 of the Convention were to be resolved by the Grand Chamber in the case of *Šilih*. In the final analysis, the Strasbourg judges themselves recognised the difficulties springing from the divergent decisions in its jurisprudence (para. 152).

The judges’ decision begins with an analysis of the principles set forth in the *Blečić* decision. It examines the effects of the “key/constitutive facts” test set forth therein as it relates to the temporal aspect of the facts underlying the complaint, as well as the necessity to take into consideration the scope of the alleged violation of rights guaranteed by the Convention. The Court reminded that the failure of a subsequent reaction (redress) to the alleged interference (if such interference

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no. 23954/94, judgement of 31 May 2001 (unpubl.), para. 84; *Sarli v. Turkey*, application no. 24490/94, judgement of 22 May 2001 (unpubl.), para. 69; *Imakayeva v. Russia*, application no. 7615/02, judgement of 9 November 2006, ECHR 2006-XI, para. 141.

<sup>32</sup> Application no. 25781/94, judgement of 10 May 2001 (Grand Chamber), ECHR 2001-IV.

<sup>33</sup> Judgement of 18 September 2009, to be published in ECHR.

took place prior to the entry into force of the Convention), would not serve to give the Court *ratione temporis* competence (para. 146). The Court, however, introduced a new element by saying that the test and criteria of the *Blečić* case were of a “general character”, whereas implementation of the test required taking into account the “special nature” of those rights guaranteed by Articles 2 and 3 of the Convention. The Court added that Articles 2 and 3 were among “the most fundamental provisions in the Convention and also enshrine[d] the basic values of the democratic societies making up the Council of Europe” (para. 147).

The Court’s further analysis took place within the context of this “special nature” of the right to life. It pointed out the distinction already made in Strasbourg jurisprudence between the substantive and procedural aspects of Article 2. At the same time, it stressed that the procedural aspect, connected with the implementation of effective proceedings which would allow a victim to uncover the facts and provide for an effective remedy, whether in the form of criminal or civil proceedings or both, constituted an inherent element of Article 2. In other words, the Court declared that protection of the right to life could not exist without procedural safeguards and their effective implementation. The procedural aspect necessarily and inherently co-exists with the substantive obligations.

The core of the Court’s argumentation encompasses two concepts: that procedural obligations are essential and natural (even if they are the result of an evolution in the understanding of the right to life); and that the procedural obligations are of an autonomous nature and may be treated separately from the substantive aspect. As a result, the Court concludes that the requirement to implement effective proceedings allowing victims (or their legal representatives) to discover facts and granting them appropriate remedies are obligatory upon a State-Party to the Convention, even if the facts giving rise to the violation of Article 2 occurred before the entry into force of the Convention in the territory of such State-Party (para. 159).<sup>34</sup>

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<sup>34</sup> It should be emphasised that the Court developed this legal mechanism for stretching this procedural aspect back to before the “critical date” – described below – based solely on the provisions of Article 2 of the Convention. Not even the UN Human Rights Committee has gone so far (in applying the International Covenant on Civil and Political Rights), nor has the Inter-American Court of Human Rights (in its rulings on the American Convention on Human Rights). The UN Committee connected the procedural aspect with the prohibition on inhuman treatment of next-of-kin (Article 7 of the Covenant) and the right to a fair trial (Article 14); and the Inter-American Court of Human Rights connected the procedural aspect with the right to a fair trial (Article 8 of the American Convention on Human Rights) and the right to legal protection (Article 25). See the Court’s review of the jurisprudence of these two institutions in paras. 111-118 of the *Šilih* judgement.



Of course the practical question arises: for how long (i.e., within what “time horizon”) is the Court competent to review whether a given State fulfilled its procedural obligations. In this context the Strasbourg judges found that the obligation to carry out and provide effective procedures of investigation and remedy “bind the State throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it” (para. 157).

In another part of its judgement, the Court referred to the need for legal certainty. Legal certainty is based on legitimate expectations, and thus procedural guarantees would have a time limit imposed by common sense. In trying to delineate this time limit, the Court identifies two principles. Firstly, the *ratione temporis* competence of the Court only concerns the procedural acts or omissions which took place after the entry into force of the Convention (para. 162). Secondly, there must exist a “genuine connection” (*lien véritable*) between a given deprivation of life and the entry into force of the Convention in respect of the respondent State. The Court attempted to explain this unclear formula as follows: a “significant proportion” (*part importante*) of the procedural steps required by Article 2 will have been or ought to have been carried out after the critical date, i.e. entry into force of the Convention (para. 163). For it was not only “some kind of” procedural steps which were necessary to be in place after the entry of the Convention, but they had to be essential for investigative procedures. With regard to this principle, the Court recognised an exception – actually proffered only as a hypothesis: the Court did not exclude that “in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner” (para. 163 *in fine*).

I believe that the judgement of the Grand Chamber in the *Şilih* case is one of the most important decisions in the history of the Court. In accordance with its principles, the Court obtained *ratione temporis* competence (upon meeting the conditions set forth in paragraphs 162-163 of the judgement) to examine whether a State-Party to the Convention fulfilled its procedural obligations stemming from Articles 2 and 3 with respect to events which took place prior to the “critical date”. The Court based its decision on what was originally a minority view in its line of reasoning, but it should be emphasised that the Court’s decision was supported by the overwhelming majority of judges (15 votes to 2). The only dissenting opinions, in favour of upholding the *Moldovan*, *Voroshilov* and *Kholodov* precedents, were expressed by the Turkish judge Rıza Türmen and the British judge Nicolas Bratza.

Some of the “fundamental formulas” which the Court expressed as a means to establish its *ratione temporis* competence can indeed raise problems of inter-

pretation. This is especially true with respect to the key element in the Court's argumentation, the need to find a "genuine connection". This is a quite general formula, and given the fact that there are no earlier guidelines for application in the Court's opinions, it can lead to divergent conclusions or the adoption of a casuistic approach in future decisions. Several judges noted the lack of precise guidelines in concurring opinions attached to the judgement.<sup>35</sup>

The question arises, how wide is the scope of the possibilities to apply the Convention after the *Šilih* case? The criterion of a "genuine connection" eliminates the possibility of a "revitalisation" of proceedings already completed prior to the entry into force of the Convention. Complainants will only be able to allege a State's failure to comply with its procedural obligations in cases where proceedings are still underway concerning events which took place prior to the entry into force of the Convention on the territory of a State-Party. In practice, such a connection will be possible only in the case of newly acceded States.

However, the criterion of a "genuine connection" is applicable to "ordinary events". The Court declared that the existence of such a connection will not be necessary with regard to situations which require intervention in order to assure that the "the guarantees and underlying values of the Convention are protected in a real and effective manner." It would seem that in the first instance such "situations" should be deemed to include instances of crimes against international law which were never subject to an effective investigation. Judge Vladimiro Zagrebelsky raised a similar concern *en passant* in his concurring opinion, where he wrote that the rule of "a reasonable time frame" linking a State's procedural obligations did not concern "crimes not subject to the statute of limitations."<sup>36</sup>

The *Šilih* judgement makes it possible to question the lack of effective proceedings in the case of acts committed during World War II, if such acts can be characterised as international crimes which were never subject to an effective investigation. While the crimes committed by the Axis powers were investigated and the perpetrators brought to justice, the situation regarding the actions of the Allied forces is different. The principles set forth in *Šilih* could be applied, for example, to acts committed by the Soviet Army on the eastern territories of the Reich, such as the executions which took place on 23 April 1945 in Treuenbri-

<sup>35</sup> These are three concurring opinions by judges Peer Lorenzen, Boštjan M. Zupančič i Vladimiro Zagrebelsky (which were also joined by four other judges).

<sup>36</sup> One may ask why the Court did not clearly express that the "situation" it identified concerned international crimes. One hypothesis is that the judges did not wish to have the conditions they elaborated narrowed down to be only applicable to such crimes. As it stands, the procedural obligations are arguably applicable to a greater range of events.

etzen outside Berlin.<sup>37</sup> By analogy one could also imagine complaints concerning other Allied activities, such as the carpet-bombing of German cities,<sup>38</sup> or the treatment of Germans in transit centres (Łambinowice, Świętochłowice).<sup>39</sup> In the context of other historical events, theoretically it would be possible to question the lack of effective proceedings even in the massacre of Armenians in Turkey in 1915.

It should be observed that already the very fact of finding a complaint admissible may give some satisfaction to complainants, even if the Court later decides that the respondent State adequately carried out and fulfilled its procedural obligations. The Court's finding that it has *ratione temporis* competence carries with it a finding that the historical event, which the complainant alleges has not been adequately investigated, constitutes an international law crime. The filing of a complaint may, thus, have a completely different aim than securing a judgement against a given State for failure to fulfil its procedural obligations under the Convention (e.g. to secure the legal classification of a given event).<sup>40</sup>

The author would like to conclude this discussion of the procedural obligations of a State-Party arising from Article 2 of the Convention with a certain personal digression. The author is the initiator of the so-called “Katyń complaint” to the ECHR, connected with the murder by the Soviet Union of almost twenty-two

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<sup>37</sup> After re-taking the city, following their earlier expulsion by the Wehrmacht, Soviet Army units murdered more than a thousand inhabitants. Investigation into this alleged war crime was begun on 2008 by the German Prosecutor, who petitioned the Chief Military Prosecutor's Office of the Russian Federation for legal assistance. This petition has remained unanswered. The crime was described in November 2008 in Brandenburg newspapers and in the all-German *Die Welt*.

<sup>38</sup> Of which the best-known is the allied bombing of Dresden on the night of 13-14 February 1945, during which 25-40,000 Germans were killed. The fullest description of this act is contained in F. Taylor, *Dresden: Tuesday, February 13, 1945*, Harper Collins Publishers, London: 2004.

<sup>39</sup> For more on the topic of the camp in Świętochłowice see: A. Dziurok (ed.), *Obozowe dzieje Świętochłowic Eintrachthütte-Zgoda* [The history of the Świętochłowice-Eintrachthütte Agreement], Instytut Pamięci Narodowej, Katowice-Świętochłowice: 2002.

<sup>40</sup> The Court has faced such practices in other complaints. For example, the Azerbaijanis who were deprived of their property and expelled from Nagorno Karabach are accusing not only Armenia but also Azerbaijan, the latter for failure to engage in effective actions aimed at return of their property. The complainants are not so much interested in obtaining a favourable judgement as to Azerbaijan's guilt as in obtaining the indirect affirmation of the ECHR – as a consequence of its recognising the complaint – that Nagorno Karabach continues to be Azerbaijani territory. The Georgians expelled from Southern Ossetia and Abkhazia are seeking a similar effect in their complaints against the Russian Federation and Georgia. This manoeuvre was successful for the first time in the case of *Ilaşcu and others v. Moldova and Russia* (application no. 48787/99, judgement of the Grand Chamber of 8 July 2004, ECHR 2004-VII), which concerned Transdniester.

thousand Polish citizens in 1940. In the light of the “old” Strasbourg decisions (*Moldovan*, *Voroshilov* and *Kholodov*), it seemed likely that the case – based on the accusation that the completed Russian investigation regarding Katyn did not fulfil its procedural requirements under Article 2 of the Convention (in part because the investigation was classified confidential) – would be rejected by the Court based on its lack of *ratione temporis* competence. In a surprising turn of events, however, certain statements made by the Russian courts of final instance in two separate verdicts opened up the possibility of reliance on Article 2 of the Convention. In reviewing the rulings of lower courts concerning procedures involving the classification of state secrets and the rehabilitation of victims, the Russian higher courts declared that during the prosecution of the Katyn case it was not established what happened to the “Katyn victims” after they were transferred in the spring of 1940 to the local commissions of the NKVD. This enabled the victims to be classified as “missing persons” and to rely on the precedents established in the *Varnava* case. After the *Šilih* verdict, however, this no longer seems necessary. We can file a complaint alleging that Russia failed to fulfil its procedural obligations under Article 2 of the Convention, and because of the character of the underlying “substantive events” (the Katyn massacre), the Court, in deciding whether to admit our complaint, will have to decide as a preliminary matter whether the Katyn massacre constituted an international crime not subject to the statute of limitations.<sup>41</sup>

V. Questions concerning the Court’s *ratione temporis* competence have also arisen in the Strasbourg jurisprudence relating to the protection of property (Art. 1 of Protocol no. 1).<sup>42</sup> In contrast, however, to the jurisprudence on the procedural obligations arising from Articles 2 and 3 of the Convention, the decisions of the

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<sup>41</sup> In the end, the legal argumentation submitted to the Court included, as one variant, allegations based on the proportion rule (the key events and decisions took place after the entry into force in Russia of the Convention, i.e. after 5 May 1998) and as a second variant qualification of the Katyn massacre as an international crime not subject to the statute of limitations. At present three Katyn complaints are before the Court. Most advanced is the case of *Wołk-Jezińska and Others v. Russia*, application no. 29520/09, which the President of the First Chamber designated as a priority case in its communication to the Russian Government of 24 November 2009. The two remaining complaints are *Kraczkiewicz and Others v. Russia*, application no. 15120/10, and *Wojciechowska and Mazur v. Russia*, application no. 17883/10.

<sup>42</sup> Although this provision formally refers to protection of property (*protection de la propriété*), it has a wider application through its guarantee of “peaceful enjoyment of his possessions” (*respects de ses biens*). Art. 1 Protocol nr 1 in full reads as follows:

Strasbourg Court in this regard have created – at least with regard to basic rules – a uniform line of jurisprudence.

Deprivation of property (or other rights *in rem*) is treated by the Court as a temporally closed event. Thus, if the act of expropriation (deprivation of property rights) took place before the entry into force of the Convention on the territory of the State where the act occurred, the provisions of the Convention cannot be applied.<sup>43</sup> In addition, the continued existence of the effects of expropriation after the “critical date” are not considered as violations of the Conventions provisions. In other words, the continued existence of such effects is not classified as a continuous and ongoing interference.<sup>44</sup>

Furthermore, inasmuch as Art. 1 of Protocol no. 1 does not guarantee the right to acquire property,<sup>45</sup> it cannot be interpreted as either creating an obligation on the part of a State to return property expropriated before the “critical date”, nor as a restraint on the legislative powers of a State to determine the scope and conditions according to which expropriated property will be returned to former owners.<sup>46</sup> Persons excluded from the scope of re-privatisation statutes cannot claim that they possessed a “legitimate expectation” of obtaining a particular form of property rights.<sup>47</sup>

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1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
  2. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

<sup>43</sup> This principle was first enunciated by the Commission in the case of *A. B. and Company A.S. v. Germany*, application no. 7742/76, decision of 4 July 1978 (plenary session), DR 14, p. 179. In that case the Commission relied on the earlier decision of *X. v. United Kingdom*, application no. 7379/76, decision of 10 December 1976, DR 8, p. 211.

<sup>44</sup> *Malhous v. Czech Republic*, application no. 33071/96, decision of 13 December 2000 (Grand Chamber), ECHR 2000-XII; *Mayer and others v. Germany*, application nos. 18890/91, 19048/91, 19342/92 and 19549/92, decision of 4 March 1996, DR 85, p. 5; *Brežny i Brežny v. Slovakia*, application no. 23131/93, decision of 4 March 1996, DR 85, p. 65.

<sup>45</sup> *Van der Mussele v. Belgium*, application no. 8919/80, judgement of 23 November 1983, Series A. 70, para. 48; *Slivenko and Others v. Latvia*, application no. 48321/99, decision of 23 January 2002 (Grand Chamber), ECHR 2002-II, para. 121.

<sup>46</sup> *Jantner v. Slovakia*, application no. 39050/97, judgement of 4 March 2003, para. 34; *Szechenyi v. Hungary*, application no. 21344/93, decision of 30 June 1993 (unpubl.); *X. A.G., Y. A.G. and Z. GmbH*, application no. 7694/76, decision of 14 October 1977 (plenary session), DR 12, p. 131.

<sup>47</sup> *Gratzinger i Gratzingerova v. Czech Republic*, application no. 39794/98, decision of 10 July 2002 (Grand Chamber), ECHR 2002-VII, para. 69.

The above-mentioned principles established by the Court have been applied in its review of complaints concerning confiscations against the Germans after World War II. Two decisions are examined below; concerning the alleged deprivation of the property rights of the so-called “Sudeten Germans” and those of the Germans living in formerly German territories granted to Poland after World War II.

The resettlement (the Germans use the term “expulsion”) of the Sudeten Germans and accompanying property confiscations took place on the basis of two so-called “Beneš Decrees”:<sup>48</sup> no. 33/1945 of 10 August 1945, stripping Czechoslovakian citizenship from those persons who “were granted German or Hungarian citizenship by appropriate decrees of the occupying forces”<sup>49</sup>; and no. 108/1945 of 30 October 1945, concerning the confiscation of property of Germans, Hungarians, traitors and collaborators, as well as other persons “whom the State has reasons not to trust”.<sup>50</sup> Following the fall of communism in what was then still Czechoslovakia, the legislature passed Act no. 89/1991 on Extra-Judicial Rehabilitation (which entered into force on 1 April 1991). This Act envisioned the correcting of wrongs committed by the communist authorities, including the return of confiscated property, if the petitioner was a natural person possessing Czechoslovakian citizenship. The provisions of these two acts were further developed in two subsequent acts: Act no. 229/1991 on Land Ownership (defining the prerequisites for claims for return of property), and Act no. 243/1992 on Restitution, which in addition to the requirement that the claimant possess Czechoslovakian citizenship added the requirement that the claimant be a permanent resident of Czechoslovakia. The Czechoslovakian Constitutional Court subsequently ruled that the latter requirement was in violation

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<sup>48</sup> President Edward Beneš returned from emigration on 9 May 1945. The Decrees, which he issued, were later approved by the National Assembly.

<sup>49</sup> “Decree of the President of the Republic in the matter of regulating the citizenship of persons of German or Hungarian nationality” (*Dekret presidenta Republiky o úpravě československého státního občanství osob národnosti německé a maďarské*). Czechoslovakian citizenship was reserved to persons who did not commit crimes against Czech and Slovak citizens or alternatively “took part in the war of liberation or underwent suffering as a result of Nazi or fascist terror.”

<sup>50</sup> “Decree of the President of the Republic in the matter of confiscation of enemies’ property and of the national rebuilding fund” (*Dekret presidenta Republiky o konfiskaci nepřátelského majetku a Fondech národní obnovy*). This decree also exempted from its provisions persons who actively fought to retain the territorial integrity of Czechoslovakia or to liberate the country.



of the Czechoslovakian Constitution.<sup>51</sup> At the same time, the Court upheld the validity of Decree no. 108/1945.<sup>52</sup>

The post-war decisions concerning nationalisation were the subject of a complaint filed by Bergauer and 89 others against the Czech Republic.<sup>53</sup> They argued that the decisions violated Art. 1 Protocol no. 1 in connection with Article 14 of the Convention prohibiting discriminatory treatment. In the opinion of the authors of the complaint, the Beneš Decrees, still in effect today, constituted an act of illegal discrimination inasmuch as they were based on the criteria of nationality and citizenship. They argued that the post-communist legislation concerning the return of property suffered from the same legal defects. They also argued that the Czechoslovakian (later Czech) laws in question violated the principle of the supremacy of natural law over state law in questions connected with the restitution of property (*sic!*).

Their complaint also contained some “politically provocative” statements. In the first place, they alleged that the confiscation of property and expulsion from Czechoslovakia constituted an (ongoing) act of genocide against the German people. Secondly, the complaint questioned the continuity (i.e. validity) of the Czechoslovakian government, which existed until October 1938, and then again from May 1945. According to the complainants the Beneš Decrees were an act of usurpation, lacking in democratic legitimacy.

The concise meritorious section of the Court’s decision, consisting of just four pages, seems nevertheless to be superfluous. The judges could have dismissed the complaint relying solely on the failure to exhaust national remedies (Article 35 para. 1 of the Convention). As is well known, complainants may not lodge complaints with the Court until they have taken advantage of all available national remedies at all levels, i.e. they are required to defend their rights first in the courts of the State alleged to have violated them. The German complainants did not lodge complaints either with the Czech courts of general jurisdiction, nor in the Constitutional Court. The only exception to the requirement that all national remedies must be exhausted is if the national remedies available can be proven to be futile or exist only “in theory”. But proof of the foregoing needs to be presented to the Court.<sup>54</sup>

<sup>51</sup> Judgements of 12 April 1994 and 13 December 1995. These decisions modified the law and permitted persons previously prohibited by the provisions from raising claims to do so.

<sup>52</sup> Judgement of 8 March 1995 (Constitutional complaint of R. Dreihaler).

<sup>53</sup> Application no. 17120/04, decision of 13 December 2005 (unpubl.).

<sup>54</sup> These principles are summarised in the case of *Akdivar and others v. Turkey*, application no. 21893/93, judgement of 16 September 1996 (Grand Chamber), RJD 1996-IV, paras. 67-68.

The Court first referred to its earlier declarations concerning the temporally closed nature of confiscations, reiterating that when such confiscations occur before the “critical date” they cannot be reviewed in Strasbourg. If, however, a State implements – not only following ratification of the Convention but earlier as well – legislation which is aimed at the return of confiscated property or restitution for deprivation thereof, such legislation may constitute the creation of new property entitlements (rights), which would be subject to the protections contained in Art. 1 Protocol no. 1 of the Convention. The beneficiaries of such legal protections, however, could only be those persons who fulfil the criteria contained in the legislation. The delineation of criteria for restitution for the loss of property belongs to the national authorities. They can condition the return of property upon the fulfilment of various criteria, such as, for example, citizenship or permanent residence. The Strasbourg Court does not possess *ratione materiae* competence to examine the complaints of persons who do not fulfil the national legislative criteria, for in their case no new property rights can be said to have arisen (nor legitimate expectations). The Czech legislation concerning restitution restricted to right to regain property confiscated after the Second World War upon the actual possession of Czech citizenship. The complainants in the case did not fulfil that requirement.<sup>55</sup>

If the Court is not competent to review allegations of violations of Art. 1 of Protocol no. 1 – whether for the temporal (historical expropriations) or substantive reasons (failure to fulfil legislative criteria) – then it cannot review the same allegations based on a non-self-reliant claim of discrimination according to Article 14 of the Convention. A violation of the prohibition against discrimination cannot exist on its own, but may only arise in circumstances whereby a given matter falls under the protection of a right guaranteed by the Convention.<sup>56</sup> This principle also excludes the questioning of “discriminatory” choices made by State authorities. The discriminatory nature of national legislation may, however, be questioned in the national courts, in particular in those competent to judge the constitutionality of legislation in those countries with constitutional provisions forbidding certain forms of discrimination.

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<sup>55</sup> It is worth observing that the Court, *en passant*, noted that the Czech courts guaranteed the protection of lost property rights (via restitution) to a greater degree than the standards of the Convention. They ordered the return of confiscated property – something not required by the Convention – in instances where the provisions of the Benes Decrees were violated.

<sup>56</sup> This interpretation of Article 14, which has been consistently and consequently applied by the Court until now, was elaborated for the first time in the applications arising from the Belgian language provisions; application nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, judgement of 23 July 1968, Series A. 6, part “The Law”, pt. I.B, para. 9.

It should be stressed, however, that this situation has been changed by Protocol no. 12, which entered into force (in respect of some countries) on 1 April 2005.<sup>57</sup> It transforms the prohibition against illegal discrimination into a self-existing norm, independent of another right guaranteed by the Convention. Following the ratification of this Protocol, it may be possible to argue that the provision of the Convention has been violated if the return of property, or restitution therefore, is made dependent upon the fulfilment of improper “discriminatory criteria”. The general prohibition against discrimination contained in Art. 1 of the Protocol<sup>58</sup> may now generate enormous legal consequences. Thus, in the context of possible claims for restitution one should seriously consider whether it makes sense to bind Poland with Protocol no. 12 before the passage of re-privatisation law (which is currently in the legislative process).<sup>59</sup>

The resettlements/expulsions and confiscations imposed on those Germans who lived in the formerly German territories transferred to Poland after the World War II (often referred to colloquially in Poland as the “regained land”) became the object of a broadly commented complaint filed by Preussische Treuhand GmbH & Co. KG A.A. against Poland.<sup>60</sup> The Court examined the facts underlying the complaint with regard to twenty-three persons who were members of the Prussian Trust and on whose behalf the Trust filed the complaint. It was decided at the same time that the Trust itself could not be deemed to have the status of a “victim” (para. 47).

The complainants alleged a violation of Art. 1 of Protocol no. 1. Their complaint was dismissed without a review on the merits for several reasons. In the first

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<sup>57</sup> European Treaty Series no. 177. The Protocol was opened up for signature on 4 November 2000. As of the time of writing this article, 17 States have ratified the Protocol (and it has entered into force in their territories), while 20 others have only signed it.

<sup>58</sup> The general prohibition in Article 1 reads as follows:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

<sup>59</sup> Czechs have only signed Protocol no. 12, but they did not ratify it. Poland, along with nine other States, has not even signed the Protocol.

<sup>60</sup> Application no. 47550/06, decision of 7 October 2008, to be published in ECHR. See also, I.C. Kamiński, *Skargi Powiernictwa Pruskiego v. Poland w Europejskim Trybunale Praw Człowieka* [The Case of Preussische Treuhand GmbH & Co. KG A.A. v. Poland in the ECHR], *Europejski Przegląd Sądowy* 2007, no. 2; M. Krzyżanowska-Mierzevska, *Skarga Powiernictwa Pruskiego – glosa do orzeczenia ETPCz z 7.10.2008 w sprawie Preussische Treuhand GmbH & Co. KG A.A. v. Poland* [Preussische Treuhand GmbH & Co. KG A.A. v. Poland – the decision of 7.10.2008], *Europejski Przegląd Sądowy* 2009, no. 2.

place, several complaints concerned confiscation of real property and other rights associated with the ownership of property which was located in former East Prussia, i.e. in the territory which after the war was administered by the Soviet Union, and earlier constituted a war front for actions by the Red Army. The Court held that Poland could not be responsible for actions (or their effects), which took place on territory conquered and subsequently subjected to the administration by another State (para. 52). Hence this part of the complaint was held to be inadmissible *ratione personae*.

Secondly, the largest group of persons alleging deprivation of property were Germans who were resettled immediately after the war. In this context the Court called attention to two circumstances. Poland issued several legal acts between 6 May 1945 and 15 November 1946 which concerned the confiscation of property formerly belonging to Germans.<sup>61</sup> This legislation, however, was the consequence of implementing provisions agreed upon at the Yalta Conference and contained in the Potsdam Agreement, provisions which laid down, in accordance with then-existing international law, the principles governing war reparations for Poland (para. 59). Hence there was no illegal, unofficial expropriation which would have been capable of creating an “ongoing situation” (in contrast to *Loizidou v. Turkey* discussed below). The stripping away of German property rights which occurred after the World War II constituted a temporally closed event over which the Court had no *ratione temporis* competence (paras. 60-61). Lastly, the Convention makes no provision for restitution or damages for the deprivation of property which occurred before the “critical date” (para. 64). Nor was there any Polish law in existence (i.e. new property laws) concerning persons deprived of their property rights which would grant such persons a “legitimate expectation” concerning property for the purposes of Art. 1 of Protocol no. 1 (para. 61). Thus, the Court also lacked *ratione materiae* competence.

V. The above-mentioned complaints of the Sudeten Germans and the Prussian Trust both repeat the claim of an illegal deprivation of property. In the former, the validity of the Beneš Decrees was also called into question (in reliance on the lack

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<sup>61</sup> These were: the Act of 6 May 1945 concerning abandoned properties, Dz.U. 1945, No. 9, item 45; the Decree of 8 March 1946 concerning abandoned and formerly German properties, Dz.U. 1946, No. 17, item 97; the Decree of 6 September 1946 concerning agricultural property and settlements on the Regained Lands and in the former Free City of Gdańsk, Dz.U. 1946, No. 49, item 279; the Decree of 15 November 1946 concerning property of States between 1939-1945 now in the State of Poland, and the property of legal entities and of citizens of such States, as well as the administration of such property. Dz.U. 1946, No. 62, item 342.

of continuity of the Czechoslovakian government), and both cases include common allegations of deprivation of property in connection with proceedings which are characterised as ethnic cleansing, crimes against humanity, and even genocide. These latter accusations must not be treated as solely politico-legal rhetoric on the part of the complainants. Rather, they are aimed at making a distinction in terms of classification of the underlying acts in such a manner as would allow the Court to find *ratione temporis* competence, even though the acts alleged to constitute an illegal deprivation occurred prior to the “critical date”.

The distinction mentioned above has its roots in the case of *Loizidou v. Turkey*.<sup>62</sup> In that case the Strasbourg institutions examined the legality of property expropriations which took place in Northern Cyprus when Turkey, following its invasion of 1974, proclaimed the existence of the Turkish Republic of Northern Cyprus (the actual declaration of independence occurred on 15 November 1983). With the exception of Turkey, no other country recognised the Turkish Republic of Northern Cyprus (TRNC) as an independent State.

Loizidou owned several plots of land which were located on the northern side of the “intra-Cyprus” border. She was unable to enjoy the use of her property inasmuch as the Turkish authorities prohibited her – as it did to many Cyprus Greeks – to return to the Turkish-occupied side of the island. Furthermore, the later Constitution of the TRNC (of 7 May 1985) contained a provision stating that all real property and attachments thereto, which on the day of 13 February 1975 (the date of proclamation of the Turkish Federal State of Cyprus, the predecessor to the TRNC) was abandoned or without ownership, would become the property of the TRNC (Art. 159).

The Court determined that it was competent to examine the allegation in the complaint of a violation of Art. 1 Protocol no. 1 of the Convention because – in its opinion – the complainant never lost her title to the property in question.<sup>63</sup> In other words, prior to the date Turkey recognised the jurisdiction of the ECHR

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<sup>62</sup> Application no. 15318/89. The Court, acting at all times as Grand Chamber, first issued a decision on the preliminary objections connected with the admissibility of the complaint (23 March 1995, Series A. 310), later issued its judgement on the merits (18 December 1996, RJD 1996-VI), and finally its judgement on the financial settlement of the claims (28 July 1998, RJD 1998-IV). Earlier the complaint had been the subject of a Commission report: from 8 July 1993 (plenary session). See also the decision to admit the application of 4 March 1991 (plenary session), DR 68, p. 216.

<sup>63</sup> Para. 46 of the judgement on the merits. In its decision concerning the preliminary objections, in particular regarding the allegation that it lacked *ratione temporis* competence, the Court stated that in resolving such an objection it had to take into account its assessment of the underlying allegations on the merits (paras. 103-105).

over individual complaints (22 January 1990) there was no valid legal act passed *in concreto* which would have had the legal effect of depriving the complainant of her property rights. Even the legal act of expropriation *in abstracto* in Article 159 of the TRNC Constitution could not constitute a legal act of expropriation, for the new State was not recognised by the international community.<sup>64</sup>

The case of *Loizidou* is significant because the Court examined the legality of the expropriation of property rights. It conducted an examination into the national norm which constituted the alleged legal basis for the expropriation and applied international law in assessing its validity. It appears that the Court would have reached the same conclusion even if the expropriation had not occurred on the basis of a general constitutional norm, but rather as the result of an individual confiscation decision undertaken by an organ of the TRNC. In order to determine whether a legal act of expropriation took place (thus creating a temporally closed situation), or whether the underlying expropriation only created a *de facto* obstacle to the complainant's use and enjoyment of her property (which would create an ongoing interference), it would appear that the key element is the "legality" of the State undertaking the expropriation or confiscation, not the legal form or method used to accomplish it.

On the basis of the *Loizidou* case, one may ask how the legal analysis adopted by the Court might have looked if the legal basis for the expropriation had been a Turkish law. In light of the *Prussian Trust* case, one might hypothesise that an act of expropriation may not be the consequence of an illegal situation under international law.<sup>65</sup> The invasion of another State and creation of a puppet administration to control it, even if assumes the title of an "independent State", would surely constitute such an illegal situation. The situation involving the expulsion of Sudeten Germans (and confiscation of their property) and the resettlement of Germans from the western lands of post-war Poland is a very different situa-

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<sup>64</sup> The TRPC's proclamation of independence was declared invalid in Resolutions 541 (1983) and 550 (1984) of the UN Security Council, calling on the members of the UN to recognise the Republic of Cyprus as the sole representative of Cyprus territory. The declaration of independence was also condemned by the Committee of Ministers of the Council of Europe, the European Community, and the heads of government of the British Commonwealth of Nations.

<sup>65</sup> In para. 61 the Court declared, after recapitulating the "key circumstances" concerning the post-war confiscation of German properties in Poland, that the "the applicants' arguments as to the existence of international-law violations entailing the 'inherent unlawfulness' of the expropriation measures adopted by the Polish authorities and the continuing effects produced by them up to the present date must be rejected."



tion from that of Northern Cyprus. The expulsion and expropriation took place as part of the creation of a post-war territorial order in Europe, establishment of war reparations, and the execution of the provisions of the Potsdam Agreement signed by the three key States in the Allied coalition.<sup>66</sup> These factors legalised the resettlements and confiscations.<sup>67</sup> In this context it is not necessary to find a post-expropriation status (and thus a temporally closed situation), for the property deprivations occurred on the basis of individual acts; it was sufficient that the expropriation were based on a general and abstract norm contained in national legislation (decrees, acts).

The issue of the legality of the expropriation, so key to the *Loizidou* case, raises the question how far the Court might be willing to go to verify the legality and appropriateness of a given confiscation/expropriation.<sup>68</sup> It should be kept in mind that the majority of post-war confiscations took place without granting damages or compensation, which was in violation of established rules of international law. Nonetheless the post-war expropriations can and must be distinguished from the Cyprus case. In the former the particularly complex situation of creating a post-war territorial order must be taken into account. This does raise the issue of comparison of the communist expropriations (nationalisation of property) with the confiscations of German properties. It would seem that the Court would need to take account of the fact that communist expropriations occurred in a political system based on values diametrically opposed to those characterising the States of the Council of Europe, which would minimise the number of requirements to deem the expropriation “legal”. In fact the Court acknowledged, in the *Bergauer* case, that the right to return of property expropriated not in accordance with existing national laws concerning confiscation/expropriation (or the granting of damages therefore) is nowhere written into Art. 1 of Protocol no. 1 (thus the Czech courts were found to have offered greater protections against property deprivation than required by the Convention). The Court thus acknowledged *implicite* that

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<sup>66</sup> These circumstances were stressed in the Prussian Trust case (para. 59). See also para. 61, alleging that the arrangements were also confirmed by bilateral treaties between Poland and Germany confirming the Potsdam borders.

<sup>67</sup> Even though this issue was addressed only in the Prussian Trust case, it could also be applied to the resettlements in Czechoslovakia, which were also approved in Chapter XII of the Potsdam Agreement.

<sup>68</sup> The Court found the violations of Article 1 of Protocol no. 1 by an 11-6 vote. Among the dissenting judges, the Hungarian judge András Baka i Slovenian judge Peter Jambrek expressed apprehension in their dissenting opinion that the Court’s decision might lead to the questioning of property re-alignments which took place in the countries of East-Central Europe following World War II.

despite the “illegality” of the expropriation *in casu*, it nevertheless brought about a loss of property rights, and hence created a temporally closed situation.<sup>69</sup>

The Cyprus case has to be treated differently. The complete responsibility for the expropriation undertaken by the TRNC was ascribed to a State which, at the time of the expropriation, was a member of the Council of Europe and a State-Party to the Convention. In addition, the act of expropriation took place on territory formally belonging to Cyprus, also a member of the Council of Europe and State-Party to the Convention. Thus, the alleged violation of the Convention took place within the so-called “legal space” (*espace juridique*) of the Convention. Put differently, since prior to the invasion by the Turkish army the entire island of Cyprus was protected by the provisions of the Convention, then surely Turkey, also a State-Party to the Convention, was required to assure that all the rights and freedoms of the Convention prevailed on the territory it occupied. The Convention, after all, is of a “special character”, constituting an instrument of European public order (*ordre public*) (para. 93 of the *Loizidou* judgement). If Turkey could not be held accountable for the conditions prevailing in that part of the island it occupied, then certainly no other legal entity could be liable.

VII. The Court’s refusal to find that the resettlement of Germans and confiscations of their property violated Art. 1 of Protocol no. 1 need not mean that it would rule similarly in all instances of post-war expulsions and expropriations. In the first instance, this concerns the so-called “voluntary resettlements”. These also involved Germans (or persons claiming German nationality) who were not subject to forced resettlement/expulsion, but rather remained in Poland and later voluntarily “re-settled”. If their real property was not taken by an official administrative decision (properly recorded in the accompanying mortgage register if such an entry existed for a particular real property), then it is possible in such

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<sup>69</sup> See also for example *I.G. v. Poland and Germany*, application no. 31440/96, decision of 7 January 1997 (unpubl.) (confiscation of property during the German occupation). If however the underlying events did not result in a legal confiscation, then the property right continued to exist and could be – following the entry into force of the Convention in respect of a given State – raised before the Court (such as in *Vasilescu v. Romania*, application no. 27053/95, judgement of 22 May 1998, RJD 1998-III). The issue whether an “old” decision confiscating property can be questioned following the entry into force of the Convention, creating either a new property right or a reasonable expectation thereof, has come before the Court on several occasions. See the differing conclusions of the Court deciding as chamber and the Grand Chamber in *Kopecký v. Slovakia*, application no. 44912/98, judgement of 7 January 2003 and 28 September 2004 (Grand Chamber), ECHR 2004-IX. The Court as chamber found a violation by a narrow 4-3 vote, while the Grand Chamber, by a vote of 13-4, found no violation.

instances to speak of a deprivation of property (loss of the right to use and enjoy) analogous to the *Loizidou* case. At the same time, the current efforts to “regulate” the status of such “old” properties via administrative decisions (and record the changes in the mortgage register) may be qualified not as a (declaratory) “ordering or regulation” of the already existent real property status, but as actual ongoing intervention into the property rights of such resettled persons. If the decisions go even further and divide the emigrants into groups of Germans and non-Germans, then this may also amount to a violation of Art. 14 of the Convention (in connection with Art. 1 of Protocol no. 1) prohibiting discrimination.

Any discussion of the Convention’s treatment of “historical” loss of property rights must also take into account the principles delineated in the Strasbourg jurisprudence in the so-called “beyond the Bug River” (“zabużański”) properties. As a result of the post-war changes in state borders in the eastern lands of the former Second Republic of Poland (referred to in Poland as “the eastern lands”), over 1.2 million persons were re-settled, leaving behind their real property. In August 1944, a so-called “Agreements of Republics” was signed between the Polish Committee of National Liberation (recognised by the Soviet Union as the Polish government) and the Soviet Socialist Republics of Ukraine, Belarus, and Lithuania. As part of the agreements, the Poland took on the obligation to “compensate” those persons who were repatriated on Polish post-war territory for the loss of their previous real property. This obligation was implemented only to a small extent.

The key decision of the ECHR in resolving the “beyond the Bug River” claims was the judgement in the case of *Broniowski v. Poland*, issued by the Grand Chamber.<sup>70</sup> The Court ruled unanimously that it was competent to review the complaint and that a violation of Art. 1 of Protocol no. 1 took place. It found that the complainants continue to be owed compensation for the property of which they were deprived, and that the failure to pay such compensation created an ongoing situation of violation (para. 122).<sup>71</sup> This decision demonstrates the unrealistic nature of the proposition, sometimes put forth in Poland, that the German government should “take over” the property claims of all expelled Germans.

<sup>70</sup> Application no. 31443/96, judgement of 22 June 2004, ECHR 2004-V.

<sup>71</sup> It should be noted that the finding of such a right and the scale and means of remedying such a right are two different things. As a result of changes in Polish law, which resulted in awarding the “beyond the Bug River” claimants compensation in the amount of 20% of the property which remained, the Court took the complaints of 176 “beyond the Bug River” complaints off its docket and closed the pilot procedures. See press communiqué no. 691 of 6 October 2008, as well as: M. Krzyżanowska-Mierzevska, *Sprawy mienia zabużańskiego przed ETPCz* [The Case of the beyond the Bug River property in the ECHR], *Europejski Przegląd Sądowy* 2008, no. 12.

If such a scheme were put into place, persons who did not receive compensation in Germany would be entitled to take their complaints to the Court based on the *Broniowski* ruling.

The issue of the existence of a right to compensation for the nationalisation of property, which could be framed in a manner similar to that of the complainants in the “beyond the Bug River” situation, has already arisen in the case of *Pikielny and Others v. Poland*, currently on the Court’s case-list.<sup>72</sup> This case concerns the lack of damages for the deprivation of property on the basis of the Act of 3 January 1946 concerning the takeover by the State of basic branches of national industry.<sup>73</sup> In Article 7 of that Act, it was envisioned that the former owners would receive compensation which would be decided upon by a special commission. Article 7 par. 6 provided that the commission was to be created by a separate regulation (ordinance), which in fact was never enacted.

It seems very likely that the Court will treat the promise to pay damages contained in the 1946 legislation analogously to the requirement to compensate the “beyond the Bug River” claimants in the Agreements of Republics.<sup>74</sup> As a result, the *Pikielny* complaint (like *Broniowski*) would become a pilot decision, identifying a structural defect in Polish law which touches upon a large number of legal entities. If the Court agrees with the complainants, in practice this will almost surely result in the filing of a large number of claims for compensation, bringing with it the necessity for passage of appropriate legislation and a need to find significant funds in the national budget.<sup>75</sup>

VIII. A related matter which has been the subject of several verdicts by the Commission and the Court concerns judgements by national courts classifying certain acts committed during World War II or immediately thereafter as crimes against

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<sup>72</sup> Application no. 3524/05. This case was joined with the application in *Ogórek v. Poland*, which was filed in the Court earlier, but communicated to the Polish authorities later (application no. 28490/03).

<sup>73</sup> Dz. U. 1946, No. 3, item 17 as amended.

<sup>74</sup> This was the position taken by the Helsinki Human Rights Foundation in its *amicus curiae* brief to the Court (filed on 10 April 2007, available on the internet site of the Foundation).

<sup>75</sup> The acknowledgment by the Court that the complainants’ property rights fell within the protections of Article 1 of Protocol nr 1 does not mean however that the State will be required to pay the complainants the full value of the lost property. On this issue the Convention leaves a wide area of discretion, and the right to property may be confronted with other rights in the public interest. In the case of the “beyond the Bug River” complainants, the Strasbourg judges decided that the 20% compensation fulfilled the requirements of the Convention.

humanity (or, in some cases, as war crimes). The complainants to the Strasbourg institutions (those convicted) have argued that the verdicts in the national courts were without legal basis and as such they violated Article 7 of the Convention prohibiting the retroactive application of law.<sup>76</sup>

In accordance with the established principles of Strasbourg jurisprudence regarding its relations with national courts, the Strasbourg institutions have held that “in principle” (as a general rule, primarily) they will defer to the decisions and applications of national law in national courts.<sup>77</sup> This principle also concerns the application of international law to resolve disputes in national courts.<sup>78</sup> The task of the Court is to assess whether the effects of the national courts’ interpretations are in accordance with the provisions of the Convention. The role of the Strasbourg judges is not, however, to correct errors of fact or law allegedly committed by national courts, unless such errors led to a violation of the rights and freedoms guaranteed by the Convention.<sup>79</sup>

The above-described principles were applied in the cases involving national court verdicts finding defendants guilty of committing crimes against humanity as a result of their actions during or just after World War II. The complainants (defendants in the national courts) argued that their actions did not constitute crimes at the time they were committed. They also argued that the retroactive application of the law in their cases was based on provisions of international law eliminating the statute of limitations for certain crimes, and that such provisions of international law

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<sup>76</sup> Article 7 provides that:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

<sup>77</sup> *Kopp v. Switzerland*, application no. 23224/94, judgement of 25 March 1998, RJD1998-II, para. 59; *N. v. Denmark*, application no. 13926/88, decision of 4 October 1999, DR 66, p. 209; *S. v. Switzerland*, application no. 17722/91, decision of 8 April 1991, DR 69, p. 345.

<sup>78</sup> *Waite and Kennedy v. Germany*, application no. 26083/94, judgement of 18 February 1999 (Grand Chamber), ECHR 1999-I, para. 54.

<sup>79</sup> *Schenk v. Switzerland*, application no. 10862/84, judgement of 12 July 1988 (plenary session), Series A. 140, para. 45; *Streletz, Kessler and Krenz v. Germany*, application nos. 34044/96, 35532/97 and 44801/98, judgement of 22 March 2001 (Grand Chamber), ECHR 2001-II, para. 49; *Jorgic v. Germany*, application no. 74613/01, judgement of 12 July 2007, to be published in ECHR, para. 102; *García Ruiz v. Spain*, application no. 30544/96, judgement of 21 January 1999 (Grand Chamber), ECHR 1999-I, paras. 28-29.

stem from the United Nations Convention of 26 November 1969,<sup>80</sup> which was also not in effect at the time of the commission of the acts by the complainants.

The Strasbourg institutions affirmed the judgments of the national courts, finding them not to be in violation of Article 7 of the Convention. At various places, they emphasised that paragraph 2 of Article 7 of the Convention was specifically aimed at sanctioning post-war legislation regarding the apprehension and punishment of persons guilty of war crimes, treason, or collaboration with the enemy, as evidenced by the reports of the drafters of the Convention. The same *ratio legis* identified in *travaux préparatoires* was extended to cover crimes against humanity as well.<sup>81</sup>

As a consequence of the restricted review undertaken by the Court and the Commission, these two Strasbourg institutions agreed with the national courts and did not find violations of Article 7 of the Convention in several high profile cases. Furthermore, it happened not only in cases concerning the actions of fascist governments and administrations under the control of fascist governments, but also the actions of communist (i.e. Soviet) governments and those governments under Soviet control.

In the following cases, the Court accepted conviction for “historical acts” deemed to constitute crimes against humanity (or war crimes) in States-parties to the Convention:

- a) *Touvier v. France* – during the war, the complainant was one of the high officers of the state militia in Lyon, supervised by the Germans;<sup>82</sup>
- b) *Papon v. France* – during the war, the complainant was a high administrative clerk accused of taking part in the deportation of Jews to concentration camps;<sup>83</sup>
- c) *Kolk and Kislyiy v. Estonia* – the complainants were workers in the Soviet security organs and after the war took part in the preparatory activities and the deportation of Estonians to the hinterlands of the Soviet Union;<sup>84</sup>

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<sup>80</sup> Dz.U. 1970, No. 26, item 208 as amended by Dz.U. 1971, No. 7, item 85. The UN Convention entered into force on 11 November 1970.

<sup>81</sup> *Touvier v. France*, application no. 29420/95, decision of 13 January 1997 (plenary session), DR 88, p. 148.

<sup>82</sup> Application no. 29420/95, decision of 13 January 1997 (plenary session), DR 88, p. 148.

<sup>83</sup> Application no. 54210/00, decision of 15 November 2001, ECHR 2001-XII.

<sup>84</sup> Application nos. 23052/04 and 24018/04, decision of 17 January 2006, ECHR 2006-I.



- d) *Penart v. Estonia* – the complainant was a high-level functionary in the Soviet security organ, organising actions (including murders) against activists in the post-war anti-communist guerrilla organisations.<sup>85</sup>

Recently, however, the ECHR has departed from its custom of limited review of national court convictions of international war crimes, in the case of *Kononov v. Latvia*.<sup>86</sup> It declared that its principle granting national courts a wide scope of authority in applying and interpreting national law does not extend to situations where the Convention clearly refers to national legislation (or international law). In such cases, errors in the application of such national legislation (or international law) may result in a violation of the Convention, especially with regard to Article 7. If a national court applies a legal criminal norm (arising from either national or international law) to a situation where such norm is inapplicable, it directly violates the provision of Article 7 providing that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed” (para. 110). In elaborating this rule, the Court made the following distinction: national courts are authorised to determine the facts, and in this sphere the Strasbourg judges must grant wide discretion; but determining which law applies to the facts and how it is to be applied is a different matter (para. 111).

The Kononov case involved the leader of a group of Soviet guerrilla partisans, who during a reprisal raid on a village in 1944 killed nine inhabitants of the village, whom they accused of earlier providing information to the Germans and of giving up other guerrilla partisan formations in the village. Among the nine inhabitants killed were three women, one in the last month of pregnancy (she was thrown into a burning building).

After the war, Kononov, a Latvian citizen, received the Order of Lenin, the highest Soviet medal, for his war efforts. After the Latvians regained independence, they accused Kononov of war crimes, found him guilty, and sentenced him to twenty months in prison. In Russia, the Kononov case was presented as the persecution of a “hero of the War for the Fatherland (the Russian term for the World War II)” and as part of a general scheme on the part of the Baltic states to “falsify history”. President Putin granted Kononov Russian citizenship in April 2000, and the authorities of the Russian Federation joined Kononov’s complaint to the Court as an “interested third party,” obviously in support of his position.

<sup>85</sup> Application no. 14685/04, decision of 24 January 2006 (unpubl.).

<sup>86</sup> Application no. 36376/04, judgement of 24 July 2008. See also the later judgement in *Korbely v. Hungary*, application no. 9174/02, judgement of 19 September 2008 (Grand Chamber), to be published in ECHR.

By the narrowest of margins in a 4-3 vote, the Court found that Kononov's conviction was in violation of Article 7 of the Convention. The Strasbourg judges questioned the qualification assigned to Kononov's action by the Latvian courts, in particular the finding that persons murdered were, based on the rules of then-existing international humanitarian law (of 1944), civilians and not combatants. According to the ECHR, the "fallback rule of interpretation", based on the principle that if someone does not belong to a clearly defined category such as "combatant" then he or she should be classified as a civilian, is derived from post-war legal acts (the Fourth Geneva Convention relative to the Protection of Civilian Persons in Times of War of 12 August 1949; and the Fourth Additional Protocol to the Geneva Convention Concerning the Protection of Victims of International Armed Conflicts of 8 June 1977). These legal norms did not exist in 1944, and under the existing circumstances Kononov had the right to treat the nine village inhabitants as combatants.<sup>87</sup> The Latvian Courts thus convicted him for "an act which did not constitute a criminal offence under national or international law at the time when it was committed," in violation of Article 7 of the Convention.

The three dissenting judges (Elisabet Fura-Sandström, David Thór Björgvinsson, and Ineta Ziemele) raised two fundamental arguments in their joint dissenting opinion. Firstly, they questioned the Court's interference into a sphere traditionally reserved to the national courts, i.e. the interpretation of law.<sup>88</sup> Secondly, they disagreed that the later post-war legal norms governing international humanitarian law were applied retroactively.<sup>89</sup>

It is worthwhile to note the far-reaching consequences resulting from the concurring opinion of the Dutch judge Egbert Myjer, who agreed with the Court's

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<sup>87</sup> The men were equipped with rifles and grenades received from the Germans "for purposes of self-defence" which allowed them – according to the Court – to be classified as combatants. The treatment of the women created greater problems, but the Court found that, by their participation in giving up the first group of guerrilla fighters, they "abused their civilian status" (para. 139).

<sup>88</sup> This issue is also included in the additional separate individual opinion by judge David Thór Björgvinsson, who also pointed out that the Court should take into account the difficult and complicated history of Latvia during the World War II, in particular the fact that the Soviet Union appeared not in role of liberator, but rather as an "enemy occupying force".

<sup>89</sup> It was argued that, among other things, the inhabitants of the village unquestionably deserved civilian status (and the protections that went with it) as a result of the so-called Marten's clause, which established the permanent elements of the law of war and humanitarian law beginning from the Hague Conventions of 1899 and 1907 (this clause, which was expressed in various ways, granted to civilians the protections of the law of nations, based on the concepts of humanity and public conscience; it also forbade leaving the judgment of situations not envisioned in the Conventions to the "arbitrary assessments of the leaders of armed forces").

decision, but argued that it should have been based on different reasoning. Judge Myjer expressed the view that the principles contained in the charter of the International Military Tribunal, commonly known as the Nuremberg Tribunal, upon which the Latvian courts relied in convicting Kononov, were only applicable to the acts committed by “war criminals” of the Axis powers (as well as their collaborators in other States). The Nuremberg principles cannot be applied to acts, even if such acts constituted crimes under international law, perpetrated by the Allied coalition of States or persons acting on their behalf. Based on Myjer’s reasoning, the Nuremberg Tribunal constituted an exceptional institution, a place for “settling wrongs arising from the war.” This was its specific purpose, and its rules and authority extended no further than what was necessary to accomplish its purpose. To the extent the Nuremberg principles could be considered as rudimentary norms of international justice and as prohibitions of certain activities, they could only be applied universally to future acts. i.e. to acts committed after the conclusion of the World War II. If Judge Myjer’s views were accepted as a statement of existing law, convicting any member of the Allied coalition of a war crime would be a violation of Article 7 of the Convention.

I cannot agree with such an interpretation. While the Charter of the Nuremberg Tribunal established what categories of persons would be tried in front of it, the material legal principles it set forth must be understood as universal. They were not “created” only in relation to the “losers” (which would be an example of a retroactive application of the law), but were drawn up as a reflection of the actual status of international criminal law which existed at the time. As a consequence, the “main war criminals” of the Axis powers were tried at Nuremberg, and the remaining “war criminals” – regardless of which side they fought on – could be tried in national courts.

The *Kononov* case is in fact the only case to come before the Court up to day wherein a person fighting on the side of the Allied coalition was convicted of a war crime (international law crime) in a national court. It naturally aroused strong emotions in the political arena, as well as controversy among legal scholars. Hence, it came as no surprise that the Grand Chamber agreed to re-hear the case.

On 17 May 2010, the Grand Chamber decided, by a vote of 14 to 3, that Latvia did not violate Article 7 of the Convention. It ruled that the international legal principles which the Latvian courts determined to be in effect at the time of Kononov’s actions were delineated with such precision that there could be no doubt but that Kononov committed a war crime under existing international law (paras. 216-227). The Court also confirmed that the crime committed was not, in the absence of any contravening rules, outside the statute of limitations (paras. 231-232).

IX. The Strasbourg institutions have also on several occasions reviewed matters relating to restrictions on the freedom of expression; restrictions which in various ways concerned historical events, particularly those which took place during the World War II. An analysis of the decisions reveals that they can be divided into three categories of expression/speech and associated issues arising therefrom:

- a) Nazi speech (i.e. referrals to “historical Nazism”) and negationist speech (calling into question the historical truth of Nazi crimes);
- b) speech/expressions regarding the events of World War II, but presenting the facts or the assessment of facts in fashion which deviates from that presented by historians or the dominant part of society;
- c) speech comparing contemporary politicians or their programs to Nazis and fascists or accusing them of white-washing history; or tolerating the existence of a person with a Nazi or fascist past in contemporary political life.

The most interesting issues with the most far-reaching legal consequences arise in the cases involving Nazi or negationist speech. The Strasbourg institutions can analyse national interference with and restrictions on the freedom of expression in these cases not based solely on the limitation clause found in Article 10 paragraph 2,<sup>90</sup> but within the context of Article 17 of the Convention. This Article provides that “[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” This wording indicated that this is not merely “ordinary” interference with free speech allowed by the Convention, but special interference which is not only permissible but may even be regarded as mandatory.<sup>91</sup>

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<sup>90</sup> Article 10 of the Convention is as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>91</sup> See, for example, the separate opinion of judge Françoise Tulkens to the *Leyla Sahin* judgement, application no. 44774/98, judgement of 10 November 2005, ECHR 2005-XI.

The legal solution contained in Article 17, although it may be associated with the old St. Just maxim that “there is no freedom for the enemies of freedom” (*Pas de liberté pour les ennemis de la liberté*), is quite innovative as a legal formula. Its inclusion in the Convention, and its earlier inclusion in the Universal Declaration of Human Rights (Article XXX) – which provided the inspiration for the Convention – was a direct consequence of the events and experiences preceding World War II. The German Nazis came to power in democratic elections.<sup>92</sup> In order to avoid repetition of the situation whereby a democratic politico-legal order is called into question by the ideological enemies of democracy, which are then able to take power and install a non-democratic regime using the democratic procedures and freedoms, international human rights instruments<sup>93</sup> as well as national Constitutions<sup>94</sup> include provisions stripping non-democratic expressions and political activities from the guarantees and protections otherwise available under the umbrella of free expression.

Although the underlying justification for placing Article 17 in the Convention is not seriously questioned in the relevant scholarly literature, there is a considerable difference of opinion concerning the interpretation of the so-called “buffer clause” and its consequences for freedoms and rights guaranteed by the Convention. There is also a divergence of views concerning the method of judicial analysis and scope of review of the clause used by the Court. The existing Strasbourg jurisprudence is not very helpful in resolving the various controversies. Alphonse Spielmann (a judge of the Court) has described the position of the Strasbourg

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<sup>92</sup> As noted by J. Goebbels in a much-cited remark: “the greatest farce of democracy will always consist in the fact that it gives its mortal enemies the means with which to kill it.”

<sup>93</sup> See Article 5 paragraph 1 of the International Covenant on Civil and Political Rights as well as Article 5 paragraph 1 of the International Covenant on Economic, Social, and Cultural Rights. The Charter of Fundamental Rights of the European Union also contains a so-called “buffer clause” (Art. 54).

<sup>94</sup> The most telling are the provisions of the German Constitution (*Grundgesetz*) of 23 May 1949. In Article 18 it provides that constitutional protections are denied to any legal entity which (on the basis of a decision by the Federal Constitutional Court), for the purpose of undermining “the free democratic constitutional order” abuses the freedom of expression, in particular freedom of the press, freedom of teaching, assembly, association, confidentiality of correspondence, or the right to property or asylum. Article 9 para. 2 provides additional, special security against abuse of the freedom of association. It prohibits any organisation or any association whose avowed aim or activities are directed against the constitutional order or “the concept of international understanding” (*Gedanken der Völkerverständigung*).

institutions to Article 17 as subject to a “variable geometry,”<sup>95</sup> and the registrar of the Court Marc – André Eissen noted its “deeply rooted ambivalence.”<sup>96</sup>

The application of Article 17, and the elaboration of principles of legal interpretation with regard thereto, first took place during the preliminary procedural phase, where the issue was whether a given complaint was admissible. Prior to Protocol no. 11, the decision at this phase was made by the Commission. A review of the Commission’s decisions reveals a visible evolution, although some decisions also diverged from the earlier-elaborated directions identified below.<sup>97</sup>

The line of decisions sprang from the banning of the German Communist Party (GCP),<sup>98</sup> which was labelled as an organisation aimed at instituting a totalitarian political system in Germany based on the dictatorship of the proletariat. The Commission ruled that the complaint (by the GCP) was not, in light of Article 17, supported by any provisions of the Convention. Put differently, the complaint did not fall within the *ratione materiae* competence of the Strasbourg institutions. It is important to note that the Commission itself raised the issue of the prohibitive effect of Article 17 in analysing the facts and circumstances surrounding the decision of the German Federal Constitutional Court.

The Commission’s underlying legal reasoning had radical consequences. Since it was determined that the Convention did not apply to certain activities (on account of their aims), the Strasbourg institutions did not have competence to examine the sanctions irrespectively how burdensome they might be for the complainants (the issue of proportionality). Two decades later the Commission reaffirmed this interpretation in the case of *Glimmerveen and Hagenbeck v. Holland*.<sup>99</sup>

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<sup>95</sup> *La Convention européenne des droits de l’homme et l’abus de droit*, in *Mélanges en hommage à L.-E. Petiti*, Bruxelles 1998, pp. 682-683.

<sup>96</sup> *Réaction au rapport présenté par M. F.G. Jacobs à l’occasion du quatrième colloque international sur la Convention européenne des droits de l’homme*, Rome 1975, p. 203.

<sup>97</sup> This evolution is similarly reconstructed by Van Drooghenbroeck, *see*, S. Van Drooghenbroeck, *L’article 17 de la Convention européenne des droits de l’homme est-il indispensable?*, *Revue trimestrielle des droits de l’homme* 2001, vol. 46, pp. 551 and following.

<sup>98</sup> *Kommunistische Partei Deutschlands v. Germany*, application no. 250/57, decision of 20 July 1957, *Yearbook* vol. I, p. 222.

<sup>99</sup> Application no. 8348/78, decision of 11 October 1979, DR 18, p. 187. The complainants were persons sentenced to two weeks of imprisonment for racist speeches and, as members of a banned association, were forbidden to stand as candidates in local elections (Nederlandse Volks Unie wanted, among other things in its fight for the “white race”, to deport all foreign workers from the country). In refusing to review the complaint, the Commission stated that Article 17 is aimed at depriving “totalitarian groups” from using the guarantees of the Convention for the realisation of their aims. It found that the complainants wanted to use the freedoms guaranteed by the Convention for activities “contrary to the letter and spirit” of the Convention.



The use of Article 17 as a “normative and procedural guillotine”<sup>100</sup> in the GCP and *Glimmerveen and Hagenbeck* cases was not, however, wholly determinative of the Commission’s jurisprudence. What dominated – which may appear surprising – was a total lack of reference to Article 17 at all. Just several months after the GCP decision, in another complaint concerning the same party and the sanctions imposed on it, the Commission referred exclusively to the “substantive” Articles of the Convention.<sup>101</sup> This approach was repeated in proceedings connected with the punishment of activities characterised as neo-Nazi,<sup>102</sup> the distribution of brochures proclaiming that the extermination of millions of Jews was a “Zionist falsehood”,<sup>103</sup> and the banning of a political movement based on the ideology of the fascist party.<sup>104</sup> The Commission acted in an analogous fashion in its analysis of complaints which challenged State laws forbidding persons who collaborated with the German occupation forces from taking part in elections, engaging in press and publication activities, and being members of certain organisations and associations.<sup>105</sup> The provisions of Article 17 were touched upon only in the Commission’s report in the case of *Becker v. Belgium*.<sup>106</sup> In that case, the Belgian challenge to the provisions of the Convention was unanimously rejected. The Commission outlined the rigours associated with the application of Article 17: the methods used to combat threats to the democratic system must be strictly proportional to the scale of the threat and the length of time the threat existed (para. 279).

<sup>100</sup> The designation of Article 17 as a procedural guillotine comes from J.-F. Flaussa, *L’abus de de droit dans le cadre de la Convention européenne des droits de l’homme*, RUDH 1992, p. 464. In French literature very often one may encounter the concept of “forfeiture” (*déchéance*) of rights. E.g. R. de Gouttes, *A propos du conflit entre le droit à la liberté d’expression et le droit à la protection contre racisme*, in: *Mélanges en hommage à Louis Edmond Pettiti*, Bruylant, Bruxelles: 1999, p. 260.

<sup>101</sup> *X., Z. i Y. v. Germany*, application no. 277/57, decision of 20 December 1957, Yearbook t. I, p. 219. This complaint concerned a sentence imposed for failing to give up a printing machine belonging to the communist party and hiding a party member. The Commission applied Articles 8-11 and 14.

<sup>102</sup> *X. v. Austria*, application no. 1747/62, decision of 13 December 1963, Collection v. 13, p. 42.

<sup>103</sup> *X. v. Germany*, application no. 9235/81, decision of 16 July 1982 (plenary session), DR t. 29, p. 194.

<sup>104</sup> *X. v. Italy*, application no. 6741/74, decision of 21 May 1976 (plenary session), DR t. 5, p. 83.

<sup>105</sup> *X. v. Belgium*, application no. 924/60, decision of 27 March 1963 (plenary session), Yearbook t. 6, p. 150; *T. v. Belgium*, application no. 9777/82, decision of 14 July 1983 (plenary session), DR v. 34, p. 158; *X. v. Belgium*, application no. 8701/79, decision of 3 December 1979 (plenary session), DR 18, p. 252; *X v. Holland*, application no. 6573/74, decision of 19 December 1974 (plenary session), DR v. 1, p. 87.

<sup>106</sup> Application no. 214/56, report of 8 January 1960, Series B. 2.

When one looks at the overall shape of the Commission's decisions, the only exceptional departure from the Commission's line of reasoning occurred in the matter of *Glimmerveen and Hagenbeck*, which was a revitalisation of the view – which seemed to have been rejected – expressed in the GCP case.

In 1984, the Commission “discovered” Article 17 again, although in a new and original fashion. The reports it prepared in the cases of *Glaserapp and Kosiek* contained the following thesis: if a State undertakes measures to protect the rule of law and democracy, Article 17 gives such aims supremacy over the protection of rights guaranteed in the Convention. The need for such State intervention must, however, be clearly identified and explained.<sup>107</sup> The words used by the Commission seem to suggest that Article 17 should be applied in conjunction with the other provisions of the Convention, hence the need to identify the nature of the threat to the rule of law and democracy which would justify the restriction of other Convention rights. Article 17 thus loses its character as a “normative guillotine”, becoming instead a specific argument which can be put forward in defence of restrictions deemed necessary. The agreement of the Strasbourg institutions with a State's reasoning that the restricted activities constitute a threat to the rule of law and democracy – but only after a careful review of the restrictions imposed and assessment that they do not constitute an abuse of Article 17 – in effect renders the State's restrictions *prima facie* in accordance with the Convention. Put differently, an exceptionally strong argument is required to undermine a State's finding of such a threat and its imposition of restrictions.<sup>108</sup>

The later decisions of the Commission are consistent in their analysis of the necessity for State intervention (hence fulfilling the third element of the test contained in paragraph 2 of Article 10), taking into account Article 17. Thus it may be said that the “buffer clause” of Article 17 has been used as an element of the interpretation of Article 10.<sup>109</sup> The first decision in which the Commission applied

<sup>107</sup> *Glaserapp v. Germany*, application no. 9228/80, report of 11 May 1984 (plenary session), Series B. 87, para. 110; *Kosiek v. Germany*, application no. 9704/82, report of 11 May 1984 (plenary session), Series B. 88, para. 106.

<sup>108</sup> The author does not agree with de Gouttes's assessment that in the Strasbourg jurisprudence concerning racist speech/expressions two approaches can be distinguished: one based on the guillotine theory and another on balancing the freedom of expression with the efforts to combat racism. It seems to the author that a third approach can also be observed: a *prima facie* assumption that restrictions on racist expressions are justified (R. de Gouttes, *A propos du conflit entre le droit à la liberté d'expression et le droit à la protection contre racisme*, in: *Mélanges en hommage à Louis-Edmond Pettiti*, Bruylant, Bruxelles: 1999, pp. 252 and following).

<sup>109</sup> Van Drooghenbroeck, *supra* note 98, p. 557, refers to Article 17 as an “interpretative aid” (*adjuvant interprétatif*). Another author has introduced the concept of “indirect usage” of Article 17: M. Levinet, *La fermeté bienvenue de la Cour européenne des droits*

this interpretation, rejecting a complaint, was the case of *Kühnen v. Germany*.<sup>110</sup> In identifying those fundamental values which underlay the entire Convention and form the rationale for Article 17, the Commission made reference to the Preamble and the pledge to maintain an “effective political democracy”. Thereafter and until the end of its existence, the Commission, without exception, repeated the formula it used in the *Kühnen* case, always in order to reject a complaint alleging that certain restrictions violated the Convention. This is reflected in the following cases upholding sanctions:

- a) *B.H., M.W., H.P. and G.K v. Austria* – involving the activities of groups inspired by the ideology of national socialism, preparing publications negating the existence of the Holocaust, employing political programs based on racial discrimination, questioning the existence of the ‘Austrian people’, and propagating the idea of a single German nation;<sup>111</sup>
- b) *F.P. v. Germany* – involving propagation of the thesis that the Holocaust was a communist and Zionist conspiracy aimed at discrediting Germany;<sup>112</sup>
- c) *Hennicke v. Germany* – involving distribution of brochures with verses glorifying the “higher race” and comparing foreigners to lice and propagating the view that there would be no peace on earth so long as power is in the hands of the Jews;<sup>113</sup>
- d) *Honsik v. Austria* – involving the issuance and distribution of publications negating the existence of gas chambers in concentration camps;<sup>114</sup>
- e) *Marais v. France* – involving negation of the existence of gas chambers in concentration camps;<sup>115</sup>

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*de l'homme face au négationnisme*, RTDH 2004, p. 657. See also G. Cohen-Jonathan, *Le droit de l'homme à la non-discrimination raciale*, RTDH 2001, pp. 667-668; P. Wachmann, *La jurisprudence récente de la Commission européenne des droits de l'homme en matière de négationnisme*, in: J.-F. Flauss. M. de Silvia (eds.), *La Convention européenne des droits de l'homme: développements récents et nouveaux défis*, Bruylant, Bruxelles: 1997.

<sup>110</sup> Application no. 12194/86, decision of 12 May 1988, DR v. 56, p. 210. The complainant was an activist in a group seeking to restore the NSDAP and the author of a number of publications.

<sup>111</sup> Application no. 12774/87, decision of 12 October 1989, DR v. 62, p. 221.

<sup>112</sup> Application no. 19459/92, decision of 29 March 1993 (unpubl.).

<sup>113</sup> Application no. 34889/97, decision of May 1997 (unpubl.).

<sup>114</sup> Application no. 25062/94, decision of 18 October 1995, DR 83-B, p. 77.

<sup>115</sup> Application no. 31159/96, decision of 24 June 1996 (plenary session), DR 86-B, p. 184.

- f) *Nachtmann v. Austria* – involving negation of the existence of gas chambers and questioning the number of victims of Nazi atrocities, particularly among Jews;<sup>116</sup>
- g) *Oschsensberger v. Austria* – involving the editing, issuance, and distribution of letters with anti-Semitic and racist texts;<sup>117</sup>
- h) *Rebhandl v. Austria* – involving the distribution of a letter negating the illegality of the Anschluss and questioning the existence of Austrians as a people and the number of victims of Nazism;<sup>118</sup>
- i) *Remer v. Germany* – involving the publication of a letter negating the existence of gas chambers in concentration camps (calling it a “Jewish falsehood” aimed at defrauding the Germans of money) and criticising immigration policies for “destroying Germany”, suggesting that the authorities prefer to grant asylum to gypsies and drug dealers;<sup>119</sup>
- j) *Walendy v. Germany* – negating the existence of Nazi victims.<sup>120</sup>

X. Before the entry into force of Protocol no. 11 (1 November 1998), only those cases which were found admissible by the Commission could be placed on the Court’s docket. As was indicated above, the application of Article 17 *in casu* acted like a sieve, leading to the acceptance of national interference as well as its character and extent (proportionality). As a result cases involving Article 17 were rarely placed on the case-list of the Court, and if so they accompanied other issues. In order for such a case to reach the Court, the Commission had to reject a State’s argument that a particular restriction be looked at in light of Article 17 and distinguish the case before it – for various reasons – from “classic” activities contrary to the fundamental values of the Convention. As a result, the “old Court” tackled issues relating to Article 17 on only three occasions, always sitting as a Grand Chamber. None of the cases, however, concerned speech/expressions in praise of Nazism or negating the existence of Nazi crimes.<sup>121</sup>

<sup>116</sup> Application no. 36773/97, decision of 9 September 1998 (unpubl.).

<sup>117</sup> Application no. 21318/93, decision of 2 September 1994 (unpubl.).

<sup>118</sup> Application no. 24398/94, decision of 16 January 1996 (unpubl.).

<sup>119</sup> Application no. 25096/94, decision of 6 September 1995, DR 82-B, p. 117.

<sup>120</sup> Application no. 21128/93, decision of 11 January 1995, DR 80-A, p. 94.

<sup>121</sup> Judgements: *Jersild v. Denmark*, application no. 15890/89, judgement of 23 September 1994, Series A. 298; *Vøgt v. Germany*, application no. 17851/91, judgement of 26 September 1995, Series A. 323; *Lehideux and Isorni v. France*, application no. 24662/94, judgement of 23 September 1998, RJD 1998-VII.

After 1 November 1998, the Court became authorised to decide itself which complaints it would accept for review as admissible. As a result, the judges had to confront Article 17 directly and could no longer avoid interpretation of its provisions.

In its early decisions, the Court appeared to accept the legal reasoning of the Commission’s line of decisions beginning with the *Kühnen* case: Article 17 is used to determine the necessity for State intervention (restrictions) analysed in the context of Article 10. Such was the Court’s reasoning in the cases of *Witzsch v. Germany* (involving the negation of Nazi crimes in letters sent to Bavarian politicians)<sup>122</sup> and *Schimanek v. Austria* (involving the activities of neo-Nazi groups, the organisation of meetings glorifying the Third Reich and its leaders, the SS and SA, and negation of the existence of gas chambers in concentration camps).<sup>123</sup> In the latter case, the Court approved a 15-year prison sentence – an actually stiff punishment – as necessary and proportional. In the case of *R.L. v. Switzerland*, concerning the confiscation of packages containing CDs with Nazi contents, the judges applied the provisions of Article 10 – without reference to Article 17 – to find that the materials confiscated were in conflict with the basic values underlying the Convention.<sup>124</sup>

The change in the Court’s reasoning, and its choice of Article 17 as rationale, occurred in the case of *Garaudy v. France*.<sup>125</sup> In that case, the complainant, formerly one of the “intellectual leaders” of the French communist left, underwent a radical change of view in the 1990s. Following his conversion to Islam, Garaudy became a radical critic of the Jews and Israel. He did not limit himself to criticism alone – in his published works he called into question what he termed as the “Nuremberg myth”, the “Holocaust myth”, and the “founding myth of the State of Israel”. The French courts determined that several of Garaudy’s books constituted the negation of war crimes and incitement to racial hatred. In reviewing the sanctions imposed, the Court relied on Article 17. It declared that negation of the crimes committed against the Jews during the Second World War was in contradiction to the fundamental values of the Convention expressed in the Preamble (justice and peace). As a result the complaint was inadmissible *ratione materiae*.

<sup>122</sup> Application no. 41448/98, decision of 20 April 1999 (unpubl.).

<sup>123</sup> Application no. 32307/96, decision of 1 February 2000 (unpubl.).

<sup>124</sup> Application no. 43874/98, decision of 25 November 2003 (unpubl.).

<sup>125</sup> Application no. 65831/01, decision of 24 June 2003, ECHR 2003-IX.

Thus, the Court returned to the theory of the “normative guillotine”,<sup>126</sup> which it used as well in several later cases.<sup>127</sup>

The guillotine theory is based on a “dichotomic logic”. Qualifying a particular expression as encompassed by the provisions of Article 17 (placing it outside the protections of the Convention), results that the Court loses *ratione materiae* competence. Thus, the key element is the delineation of the area to which Article 17 is applied, or in other words its scope of application. Not only are the Courts decisions far from precise on this question, but the judges appear to consciously avoid giving a clear answer. Already in the *Garaudy* case the Court backed away from giving an unequivocal classification of the statements regarding Israel, which were not limited to criticism of the State’s policies but had an “a proven racist aim” (*un objectif raciste avéré*). Despite the clear implication of the Court’s *dictum*, this did not lead to the application of Article 17. Instead, the judges found it unnecessary to resolve the question of the application of Article 17 as the complaint was manifestly ill-founded on the basis of paragraph 2 of Article 10.

In practice, the Court is thus seeking to retain its competence by carefully defining the areas to which Article 17 is unquestionably applicable. In addition, the judges are creating a certain normative “grey area”. Although the Court could use the facts in the cases before it to create a set of concrete conditions or prerequisites which would trigger the application of Article 17, it prefers to analyse the cases in light of Article 10 alone.<sup>128</sup> It seems clear only that speech or expressions glorifying Nazism or negating Nazi war crimes will not be located in the “grey area” of Article 17.

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<sup>126</sup> A consistent supporter of this use of Article 17 is the renowned French expert on the Convention, Gérard Cohen-Jonathan. He writes that the earlier “weakened” interpretation of Article 17 probably arose from the fear of the Strasbourg judges that reliance on the guillotine theory would have provoked sharp criticism by “integralists of free speech” (Cohen-Jonathan, *supra* note 110, p. 680).

<sup>127</sup> *Norwood v. United Kingdom*, application no. 23131/03, decision of 16 November 2004, ECHR 2004-XI (a fine levied against an activist of the British National Party for hanging a poster with the text: Islam get out of Great Britain. Defend the British nation.); *W.P. and others v. Poland*, application no. 42264/98, decision of 2 September 2004, ECHR 2004-VII (refusal to register an organisation with the name: the National Patriotic Association of Victims of Bolshevism and Zionism); and *Ivanov v. Russia*, application no. 35222/04, decision of 20 February 2007, to be published in ECHR (distribution of a newsletter of an anti-Semitic character which called for the exclusion of Jews from public life because they incite the exploitation of other people).

<sup>128</sup> As does M. Oetheimer, who writes that while the Court should not apply Article 10 to expressions which clearly fall within the purview of Article 17, in cases of doubt Article 10 should be applied (*La Cour européenne des droits de l’homme face au discours de haine*, RTDH 2007, vol. 69, p. 65).



The recent Court case of *Vajnai v. Hungary*<sup>129</sup> also seems to leave little possibility that the protections of the Convention will be given to expressions based on the use of Nazi symbols. In that case, the complainant was the vice-president of the legally existing Hungarian Labour Party, who was found guilty of wearing, during a march, a five-pronged red star, which according to Hungarian criminal law is a prohibited “totalitarian symbol”.<sup>130</sup> In its unanimous judgement, the Court declared that the star was used “exclusively as a symbol of the legally existing leftist political group.” The provisions of Article 17 could not be applied to such a case.

In reaching their decision, the Strasbourg judges demanded that the national courts establish with precision what content was connected in the particular case with the use of the symbol. It was assumed that the red star could have many meanings and create many feelings. Besides its symbolic meaning as “representative of totalitarian communist governments,” it was also possible to associate it with the “international workers” movement, struggling for a fairer society, as well as other legally functioning political groups (para. 52). The complainants did not express views offensive to the victims of totalitarian regimes nor belong to an organisations having “totalitarian ambitions” (para. 25).

Even though the Court distinguished between the “good” and “evil” symbolism connected with the red star and demanded that the national court identify the particular meaning to which Vajnai appealed, it seems certain that the Strasbourg judges would not find any similar polysemic character in the political affirmative usage of Nazi (fascist) symbols. With regard to fascist ideology, the Court has followed a permanent, consistent, and critical attitude, not admitting of any distinction between “good” and “bad” usage. As a consequence, the Court’s oversight and control over State restrictions on Nazi expressions and activities is especially limited (or simply the Court applies the “guillotine” of Article 17).<sup>131</sup> Appearance of at least one of these circumstances must change the character of the expression. In a later part of its analysis – now based on Article 10 of the Con-

<sup>129</sup> Application no. 33629/06, judgement of 8 July 2008, to be published in ECHR.

<sup>130</sup> Paragraph 269/B of the Hungarian Criminal Code forbids the dissemination, use in public places, and exhibition of five totalitarian symbols: the swastika, the SS-badge, the arrow-cross, (sign of the nationalist and anti-Semitic group founded in 1935 by Ferenc Szálasi), the symbol of sickle and hammer, and the red star.

<sup>131</sup> The Court makes this distinction between Nazi and Communist activities and expressions even whenever the latter is connected with membership in a group with an undemocratic political program; an approach criticised in my monograph *Ograniczenia swobody wypowiedzi w orzecznictwie Europejskiego Trybunału Praw Człowieka w Strasburgu. Analiza krytyczna* [Restrictions of freedom of expression in the European Court of Human Rights in Strasbourg. A critical analysis], Wolters Kluwer Polska, Warszawa: 2010, pp. 569-570.

vention and leading the Court to a unanimous verdict finding a violation of the Convention – the Strasbourg judges stressed the multi-dimensional character of the red star symbol and the need to take into consideration the context in which it was used (paras. 52-58). *A contrario*, however, other totalitarian symbols, with an unequivocal political meaning, would be treated differently.

XI. Another area of complaints to the Strasbourg institutions has concerned restrictions placed on speech/expression concerning the debate over various historical events from World War II. Very often such expressions were elements of controversial discussions concerning events which continue to stir strong emotions in various national histories, or which question conventionally accepted or “official” versions.

As regards historical debates over national histories, one can observe an interesting dichotomy in Strasbourg jurisprudence. On one hand, such discussions certainly qualify as “matters of public interest” (*questions d'intérêt général*).<sup>132</sup> In such cases – similar as with political debates – national authorities have only very limited discretionary powers, called margin of appreciation, and the Court will exercise strict supervision and carry out a rigorous and detailed assessment of any interventions or restrictions. But on the other hand, when the debate concerns the history of a concrete nation, it is the national courts (judges), who know the place, circumstances, and context of historical events – surely much better than international judges – and would seem best equipped to assess the need for and extent of permissible restrictions on the freedom of expression.<sup>133</sup> Hence the characterisation of a debate about events in a country's history as a “matter of public interest” does not undermine the “national character” of the debate, nor would it seem to justify replacing national assessments on the need to curtail expression by a “European measure.”

The Strasbourg institutions grappled with the issue of European oversight of national restrictions on historical debates for the first time in the case of *Lehideux and Isorni v. France*.<sup>134</sup> The legal issues turned out to be so complicated that the Commission issued its decision as a plenary body,<sup>135</sup> and the ECHR heard the case in Grand Chamber.

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<sup>132</sup> In the case of *Monnat v. Switzerland*, the Court labelled the discussion concerning the actions of the Swiss government during World War II as an “extremely important” (*la plus sérieuse*) issue – application no. 73604/01, judgement of 21 September 2006, ECHR 2006-X, para. 59.

<sup>133</sup> So it was found in *Vajnai v. Hungary*, para. 48.

<sup>134</sup> Application no. 24662/94, judgement of 23 September 1998, RJD 1998-VII.

<sup>135</sup> It will be recalled that the Commission reviewed the admissibility of applications until the entry into force of Protocol no. 11 (1 November 1998), which reformed the Strasbourg intake procedures.

The case concerned criminal proceedings in France against the complainants for preparing and publishing a full-page advertisement in the national daily “Le Monde” on behalf of two associations which were seeking the rehabilitation of Marshal Pétain. The authors of the advertisement presented the main facts of the Marshal’s life in a positive light, asking the readers rhetorically if they recalled them. In the period between 1940-1945, it was written that Pétain, following the defeat by Germany, was asked to take over the reins of power, and that he achieved a cease-fire, staved off German annexation of France’s Mediterranean regions, saved two million prisoners of war, and protected the country from Nazi barbarism and atrocities. Thanks to his political talent the Marshal managed to maintain a balance between fascist Germany and the Allied governments, and on the same day he met with Hitler in Montoire he sent representatives to make contact with the Allies. His secret agreement with the Americans was aimed at liberating France and preparing the French army in Africa for that task. According to the authors, the grey-haired, ninety-year old man was sentenced after a short, pre-determined and fixed legal proceeding.

Ultimately, the complainants were sentenced in a lower court to pay damages in the symbolic amount of one franc, and to publish a fragment of the judgement in “Le Monde”.<sup>136</sup> The Cassation Court sentenced them – as it publicly explained – for their “hidden apology” which, “in an implicit but necessary fashion” white-washed war crimes. Thus, the guilt of the complainants was based more on what they did not write than the content of the advertisement. The French Court found that the advertisement overlooked the unsavoury side of Pétain’s life, in particular his responsibility for the deportation of French Jews. The complainants instead referred cleverly to the so-called “double game theory”, a theory rejected by historians.

Both the Commission (by a vote of 23-8) and the Court (by a vote of 15-6) found a violation of Article 10 of the Convention. The French authorities stressed in their legal memoranda that in cases concerning restrictions on discussions of national history, the local authorities of the State are better placed to assess the situation for two reasons. The first may be called a common historical argument – that the competence of local authorities to assess historical events in their own country is greater than that of international judges. The second reason, taking the form of a highly developed historical argument, is that the expression concerned

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<sup>136</sup> Actually the prosecution recommended suspension of the proceedings, but the judge refused to agree and sent the complaint to court. In the first instance the defendants were acquitted. This acquittal, however, was challenged by a combatant organisation and reversed by the appellate court.

very sensitive and still emotional events. The State's intervention – in addition to protecting public order and preventing crimes – was also aimed at protecting the rights of third persons, in particular, their deep sensitivities. Thus, argued the French authorities, the Strasbourg institutions should be guided in their review of the case by their analogous decisions concerning the protection of moral convictions or religious beliefs.<sup>137</sup>

Both Strasbourg institutions focused primarily on the “technique” used in the announcement and questioned by the French courts. In describing Pétain's policies as “skilful to the highest degree” the authors were clearly referring to the double game theory. They had to know that this theory has been rejected by most historians, both French and non-French. The Court went on, however, to state it could not issue an assessment of a matter which is still the object of research and subject to ongoing interpretation. In the Court's opinion, it was not dealing with established historical facts such as the Holocaust, the negation or revision of which is not, in light of Article 17, protected by Article 10. The authors' assertions could not be classified as the denial of events, which they themselves characterised as “German omnipotence and barbarianism” and “Nazi atrocities and persecutions”. At the most, the authors' assertions can be interpreted as support for one of the theories proffered in assessing the role of the Chief of the Vichy government (paras. 47-48 of the Court's judgement).

The reason for sentencing the complainants was therefore likely to be the second “technique” used by the French court, finding them guilty of an “act of omission”. The announcement presented Pétain wholly in a positive light and completely overlooked the charges made against him which led to him receiving a death sentence. The manner of presentation was highly polemical. But the Court found that Article 10 does not protect only the content of information or ideas expressed, but also the form in which they are expressed.

The authors of the publication were sentenced mainly because they did not distance themselves from specific aspects of Petain's activities, such as adoption of legal acts against Jewish population. This law allowed France to detain Jews and to send them to concentration camps. Neither affirmation of fascism nor questioning of other basic values of the Convention is protected by Article 10.

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<sup>137</sup> In the first case (protection of morals) the Court was guided by the judgement in the case of *Handyside v. United Kingdom* (application no. 5493/72, judgement of 7 December 1976 (plenary session), Series A. 24); and in the second case the reasoning of *Otto Preminger v. Austria* (application no. 13470/87, judgement of 20 September 1994, Series A. 295-A) and *Wingrove v. United Kingdom* (application no. 17419/90, judgement of 25 November 1996, RJD 1996-V) was applied.

In this case, the authors openly expressed their negative opinion about Nazi crimes and persecution of Jews. The advertisement did not, however, mention that Petain through its actions and inactions consciously attributed to those crimes. Although it is morally reprehensible, silence about those issues in the text of the article, has to be assessed in the light of other circumstances of the case. These included the fact that the prosecution, whose role it was to represent all the sensibilities which make up the general interest and to assess the rights of others, first decided not to proceed with the case against the applicants in the criminal court, then refrained from appealing against the acquittal pronounced by that court. The Court further noted that the events referred to in the publication in issue had occurred more than forty years before. Even though the complainants' remarks were likely to reopen the controversy and bring back memories of past sufferings, the lapse of time made it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years after the war. However difficult and painful the debate, it should take place in an open manner, without pre-conditions or prejudices (para. 55).

Being aware and taking into account the ongoing emotional nature of the discussion in France over its war past, the Court performed a “Europeanisation” of the discussion, subjecting it to objective rules and principles and rigorous control. Adopting the Commission's finding that there was no “urgent social need” for intervention (para. 67); the Court examined the intervention itself and not only the concrete sanctions applied (which were in fact minimal). Here, the Court's verdict seems to be based on a weaker thesis. It found the use of criminal proceedings when other, civil remedies, were available to be disproportional (para. 57). Regardless of their differences in other aspects, both Strasbourg institutions questioned the use of criminal proceedings, ignoring the fact that the sanctions applied were minimal, even just symbolic.

The case of *Lehideux and Isorni* is a special and particular case inasmuch as the reason for State interference into the freedom of expression was the white-washing of history by the omission of certain historical facts and reference to interpretative theories rejected by most experts. In most instances, however, the reasons for State interference into freedom of expression are not based on the omission of issues or facts, but on their being presented in a false, negative or offensive way.

Such was the case in *Monnat v. Switzerland*.<sup>138</sup> In a television program titled “The Lost Honour of Switzerland,” a popular view – sometimes referred to as a carefully cultivated national myth – was criticised and attacked. This view holds that during the Second World War the Swiss authorities and inhabitants

<sup>138</sup> Application no. 73604/01, judgement of 21 September 2006, ECHR 2006-X.

behaved courageously against the German fascists. The authors of the program asserted that the truth was quite different, and that it was possible even to speak of a sympathy for fascism, which grew out of the similarities in views between the fascists and the Swiss governing elite. In this regard, the authors of the program mentioned Swiss anti-Semitism, the laundering of German money, and the highly developed trade relations between Switzerland and Nazi Germany.

Following the program's emission, a protest was lodged by a group of viewers to an independent governmental commission handling radio and television complaints, arguing that the program lacked objectivity. The commission agreed with the accusation, finding that the program presented only one point of view and failed to separate fact from opinion. The television authorities overseeing programming were directed to take steps to prevent any further emission of the program or its distribution. The Commission's decision was upheld by the Swiss Federal Court, which declared in its judgement that although the "engagement of journalists" is not forbidden, viewers should have been informed that the program was not presenting "unquestioned facts" but only one interpretation of the relations between Switzerland and Nazi Germany. As a result of the Court's decision, copies of the program could not be sold within Switzerland or abroad.

The Strasbourg Court took note of the emotions involved in the discussion of Switzerland's behaviour during World War II and the divided public opinion. But that didn't change the fact that the debate concerned issues of exceptional public importance, and in such cases the State's margin of appreciation is virtually nil. While the Court acknowledged the justification for the State's action, i.e. the desire to assure that viewers obtain objective and clear information (protection of the rights of third persons), it found that such an aim had to be confronted with the circumstances surrounding the discussion of the historical issue in question, where it is impossible to attain certainty (para. 63) and fifty years have elapsed since the events (para. 64). As a result, the Strasbourg judges unanimously declared that Switzerland had violated Article 10 of the Convention, and that the sanctions it imposed constituted a form of censorship and would discourage Monnat from undertaking any such similar criticism in the future. It should be emphasised that the Court identified the national sanctions applied as a restriction on all journalists, not just on the individual complainant, frightening journalists as a whole away from presenting positions on controversial matters of public importance, thus diminishing their role as a public watchdog (*chien de garde*) (para. 70).

Thus, the Court acknowledged the fundamental significance of a free and public debate on national historical issues where attainment of factual certainty is impossible, and the need to allow for the presentation of various views and



hypotheses.<sup>139</sup> The imposition of a rigorous objectivism can be justified, if at all, primarily in cases where the historical debate concerns living persons, whose personal rights come into play.<sup>140</sup> However, even in such cases intervention by the State must be precisely justified, taking into account the conflicting opinions of various parties. It would be easier to convince the Court of the need for such intervention in the case of “offensive hypotheses” directed toward specific persons combined with the omission of known facts and available source materials.<sup>141</sup>

The role of the “elapse of time” needs to be noted inasmuch as this formula-tion was used by the Court in both the French and Swiss cases.<sup>142</sup> A significant time gap between the debate and the underlying events brings about a “re-orientation” of the State’s margin of appreciation. Broad discretionary powers, when the debate is of an actual character, become narrow with the passage of time.

A similar rigorous approach to State intervention may occur when events surrounding World War II are used, in various ways, to criticise persons holding political office or fulfilling public functions. In such cases, the key test applied by the Court is whether the criticism involves an element of political discussion around issues of general public significance. If so, then State intervention in individual expressions is treated as having significant repercussions upon freedom of speech and public debate in the given country. For this reason, the Strasbourg judges have found violations of the Convention even in instances where the national courts imposed light sanctions upon nettlesome and fiery speech. In matters considered by the Court as public debate, open criticism is permissible even if it has minimal

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<sup>139</sup> The methodology for reaching an assumption of uncertainty in discussions concerning historical events, which brings with it a tolerance of minority viewpoints, even if they are shocking or extravagant, seems to be a fundamental reconstruction of the Strasbourg standard. The Court (and national courts) are not supposed to act as arbiters in such controversies. In this context see also *Giniewski v. France*, application no. 64016/00, judgement of 31 January 2006, ECHR 2006–I, para. 51–52.

<sup>140</sup> This distinction was emphasised by the judges in the case of *Chauvy and Others v. France*, application no. 64915/01, judgement of 29 June 2004, ECHR 2004–VI, para. 69. In the *Monnat* judgement the Court, when analysing the conflict of interests, drew attention to the fact that none of the still-living politicians (or the next-of-kin of deceased politicians) who were mentioned in the program commenced any actions relating to damage to their reputations or good name (para. 62). As regards the rights of other persons (the remaining viewers) the Court found that commencement of complaints by them following emission of the program would not be a sufficient excuse for the institution of unwarranted restrictions on freedom of expression (para. 63).

<sup>141</sup> *Chauvy and others v. France*, para. 73.

<sup>142</sup> Para. 55 of the judgement in *Lehideux and Isorni*, para. 64 of the judgement in *Monnat*.

factual support. For example, the Court has found violations of Article 10 of the Convention in the following cases:

- a) *Oberschlick v. Austria* (no. 1) – involving the publication by a journalist of information submitted by himself to the prosecutor’s office, alleging that a politician committed the crime of carrying out forbidden neo-Nazi activities by proposing that different social benefits be granted to Austrians and to foreigners;<sup>143</sup>
- b) *Oberschlick v. Austria* (no. 2) – involving the criticism by a journalist, using the words “fascist” and “idiot”, with respect to a politician for a statement arguing that all of the sides fighting during World War II should be treated equally;<sup>144</sup>
- c) *Feldek v. Slovakia* – involving an allegation that a politician has a “fascist past”, based on said politician’s membership, as a teenager during the war, in the organisation “Hlinka’s Youth”; when membership in the organisation was not connected with any active role in the war and the politician repeatedly explained that he joined as a result of his passion for sports.<sup>145</sup>

Contrary to the above line of cases, however, the Court has let stand State restrictions and the imposition of sanctions for emotional invectives stripped of any public interest or value.<sup>146</sup>

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In three types of legal contexts, the European Court of Human Rights has established its jurisdiction over disputes concerning “historical situations” preceding the enactment of the Convention. The first group is composed of cases alleging a violation of the Convention due to the lack of efficient investigation of death or maltreatment (torture). In these cases, the procedural obligation is treated by the Court as independent from the substantive obligation. The second group consists of cases that involve a continuing violation of a right under the Convention, usually the right to property. The third group encompasses those cases that refer to historical events and usually involve controversial speech. Although the rationale for the Court’s competence differs among these three groups, the Court has developed interesting case law.

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<sup>143</sup> Application no. 11662/85, judgement of 23 May 1991 (plenary session), Series A. 204.

<sup>144</sup> Application no. 20834/92, judgement of 1 July 1997, RJD 1997–IV.

<sup>145</sup> Application no. 29032/95, judgement of 12 July 2001, ECHR 2001–VIII.

<sup>146</sup> E.g., *Krutil v. Germany*, where the Court upheld the fine imposed on one politician for comparing his adversary with Goebbels (application no. 71750/01, decision of 20 March 2003, (unpubl.)).